Supreme Court, U.S.
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In The

Supreme Court of the United States

LARS P. E. BILDMAN,

Petitioner,

v.

ASTRA USA, INC., ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Judicial Court Of Massachusetts

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the First Amendment requires a defamed individual to meet the heavy burden imposed on limited purpose public figures because the subject matter of the defamatory speech related to, *inter alia*, sexual harassment in the workplace and, beside numerous failed attempts to get media to present Petitioner's side of the story in one press release, counsel for the defamed individual denied and rebutted such accusations.

2. Whether the First Amendment guarantees full media defendant protection to a foreign multinational drug company and its non-resident executives when, assisted by professional "pretrial impact" consultants, executing a media strategy designed to influence potential jurors and judges in anticipation of trial.

PARTIES TO THE PROCEEDINGS BELOW

In addition to the parties named in the caption, the following parties appeared below as plaintiffs/ third-party defendants: Astra AB; Dr. Hakan Mogren and Carl-Gustav Johansson.

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OPINIONS BELOW

The opinion of the Supreme Judicial Court of Massachusetts (App., *infra*, 1a-50a) is reported at 455 Mass. 116, 914 N.E.2d 36 (Mass. 2009). The trial court's Finding of Fact, Rulings of Law and Order on the Equitable Forfeiture Claim of Astra USA, Inc. Against Lars Bildman (App., *infra*, 51a-73a) is unreported in the New England reports but appears at Nos. CIV. A.1998-580C, CIV. A.1999-1942G, 2001 WL 771185. The final judgment of the trial court is unreported (App., *infra*, 74a-79a).

JURISDICTION

The judgment of the Supreme Judicial Court of Massachusetts was entered on October 5, 2009. A timely petition for rehearing was denied on December 3, 2009 (App., *infra*, 1a). This Petition, filed within 90 days of that denial, is timely, and the jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution First Amendment:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the

> freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Constitution Clause 5 of the Fourteenth Amendment:

> The Congress shall have the power to enforce this article by appropriate legislation.

Title 28 United States Code, Section 2106 (Determination)

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

STATEMENT OF THE CASE

The growing inconsistency among lower courts concerning who can become a limited purpose public figure is ripe for clarification. Federal and state courts increasingly ignore this Court's precedent "making the determination of a defamation plaintiff's status an uncertain process differing from state to state and court to court." 1 Robert D. Sack, *Sack on Defamation*, §5.3.6, 5-39 (3d ed. 2004). The lower

court's ruling is not only unconstitutional but against national interests since it presents corporations with the unrestricted ability to silence any individuals under their authority by allowing such defamation defendants to create their own defense through the alleged libel, which is squarely against this Court's instructions. *See Hutchinson v. Proxmire*, 443 U.S. 111, 135 (1979). In addition, this case raises a related issue of great importance so far passed over by this Court, but which today has extraordinary public ramifications – the vesting in nonmedia defendants the same immunity against defamation suits as the Constitution guarantees a media defendant. The lower court's holding reflects the constitutional interpretation that nonmedia defendants are guaranteed the same immunities as media defendants. If followed by other courts, this would effectively silence corporate executives, who would otherwise voice concerns about corporate high-risk financial policies and fiscally unhealthy practices going flatly against national interests in recovering from the current financial recession. Faced with the threat of corporate smear campaigns against them and without redress, executives with unpopular views would be silenced; corporate openness, internal criticism, and self-regulation would fade away in times when needed the most.

Under the undisputed facts in this case, the First Amendment does not allow an unknown private person to be treated as a public figure when the subject matter of the alleged defamatory statements

did not relate to an issue of public controversy but merely to one of general interest[1] and concern[2] and was not the result of that private person's voluntary participation but instead the result of public accusations made by Respondents, assisted by professional "pre-trial impact" consultants, outside of that private person's control.

I. Background Factual Summary

Petitioner incorporates Background and Factual Summary by reference, (App., *infra*, 4a-14a, 52a-66a), with the following additions and clarifications. In the appeal below, Petitioner referenced the record only insofar as related to the issues appealed and refrained from commenting on Respondents' representation of the factual background relying on the appellate court to conduct its own independent review of the correctness of Respondents' citations of the trial court record. The court below, instead of conducting its own inquiry, relied on Respondents' adherence to ethical and professional rules of conduct when referencing the record. The resulting "Factual Background" section is a misrepresentation of the circumstances of the dispute between Petitioner and Respondents. Rather, it is a self-serving argument for

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[1] "[T]he parties dispute . . . reflect[s] other issues of general interest." (App., *infra*, 47a n.43).

[2] "[T]he issue . . . is a matter of general **concern**." (App., *infra*, 47a) (emphasis added).

Respondents with seminal events and facts left out, creating a distorted chain of events.

There is no record of Petitioner's making his secretary's employment conditioned on sexual favors or of her ever filing a claim against Petitioner. On the contrary, in her deposition Ms. Jutras-Feetham states, "He [Bildman] didn't pressure me, he just did. He didn't force me, you know what I mean? He didn't talk me into it." (R. Vol. XV, at R06705.018). Nor is there any record of Petitioner hiring prostitutes. In fact, the trial judge warned and instructed Respondents never to use the word "prostitute" in the courtroom. Moreover, the nexus of the conflict between Petitioner and Respondents was Petitioner's disapproval of the parent company's actions in disregard of F.D.A. rules including: 1) in a New Drug Application attempting to pass off test results from a product other than that for which it was seeking approval; 2) actively concealing from Petitioner and the F.D.A. severe fetus defects in the pregnant monkey on a drug Petitioner was preparing for human clinical trials in the United States; and 3) that dose ranges on batches of products shipped from Sweden to the United States did not meet specifications. (App., *infra*, 63a). Likewise, Petitioner refused to honor Respondents' request that he deliver false information to the investment community at a stockholder road show at the Plaza Hotel in New York City in or about August 1995 about a severely delayed new product launch. Petitioner also refused to have Astra USA pay out tax-free consulting fees to business

friends of the parent company's CEO, Swedish and American alike, for work never wanted or delivered.

Further, Respondents approved the publication of the *Business Week* article after the magazine's editorial board had turned it down.[3] (R. Vol. II, at R00581-82). In fact, Respondents caused the defamatory publication by firing Petitioner, cancelling his scheduled follow-up meeting with the magazine and calling *Business Week* to a meeting where Respondents authorized the publication of the article as well as issued a press release launching its smear campaign against Petitioner. (R. Vol. II, at R00582-83).[4] In addition, Respondents' professional media campaign (R. Vol. III, at R00910-15), published or caused to be published untrue allegations of Nazi sympathies including a swastika on Petitioner's office wall and *Mein Kampf* in his office bookshelves. (R. Vol. III, at R00771). Likewise, Respondents also caused the publication of the untrue statement that Petitioner had pleaded guilty to tax fraud when his plea was done under 28 U.S.C. §7206(1), a perjury statute without elements of fraud or underpayment of taxes. (R. Vol. III, at R00909). Still, the facts relevant to the issues raised in this petition are correct and undisputed.

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[3] The court below left this fact unnoticed.

[4] Likewise, the court below left this fact unnoticed.

II. Trial Court Litigation

Respondents brought action against its former chief executive officer, Petitioner, alleging breach of fiduciary duty, seeking to recover compensation paid to him during period of disloyalty and amounts paid by employer to investigate wrongdoing including settlement amount paid to the E.E.O.C. Petitioner counter-claimed, seeking attorney fees under employment agreement and alleging claims for libel. The trial court entered summary judgment in favor of Respondent on Petitioner's attorney-fee and libel claims. Additionally, after a jury trial at law and a subsequent bench trial in equity, the court entered final judgment denying Respondent's claim for amounts paid to investigate Petitioner including amounts paid to the E.E.O.C. and confirmed the dismissal of Petitioner's claims for libel holding that he was a limited purpose public figure. (App., *infra*, 75a-78a).

III. Appeal Below

After transferring the case *sua sponte* from the Appeals Court, the Supreme Judicial Court of Massachusetts held that:

(1) Petitioner was required to forfeit all compensation paid to him during the period of disloyalty;

(2) Since Respondent Corporation is incorporated in the State of New York, Massachusetts

equity doctrine did not apply to reduce the amount of compensation forfeited.

(3) Respondent, Astra USA, was not entitled to recover costs of investigation;

(4) Petitioner was not entitled to recover attorney fees under employment agreement; and

(5) Petitioner was a limited purpose public figure required to prove that Respondent acted maliciously in making allegedly false statements about Petitioner. (App., *infra*, 49a-50a).

In his appeal to the Supreme Judicial Court of Massachusetts, and in his petition for rehearing, Petitioner argued against the trial court's ruling on constitutional grounds. (Brief of Appellee Bildman pp. 34-40 (relying on the seminal trilogy of cases following *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974)); *see also Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485 (1984) (holding that the question of First Amendment protection in defamation cases is always decided on grounds of federal constitutional law). Respondents relied on obscure and unconstitutional state law and in addition argued orally for a "bad behavior doctrine" similar to one adopted in Alaska. *See Alaska Statebank v. Fairco*, 674 P.2d 288 (Alaska 1983). Under this "voluntary bad behavior doctrine," Petitioner, so Respondents argue, became a public figure through his alleged "bad behavior" that lead Respondents to publish defamatory statements which caught the attention of media. (App., *infra*, 47a-48a n.43).

The Supreme Judicial Court of Massachusetts, in a shallow and summary analysis, agreed with Respondents and held that Petitioner was a limited purpose public figure. (App., *infra*, 46a-49a). Although announcing its analysis as a two-part *Gertz* test, (App., *infra*, 46a-49a), the court ignored all instructions given in *Gertz* and its progeny as to the existence of a public controversy and the characteristics of a limited purpose public figure. *See Wolston v. Reader's Digest Ass'n*, 443 U.S. 157, 166-69 (1979); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 351-52 (1974). Specifically, the court did not identify a public controversy, but merely pointed to issues of general interest and concern. Instead of following this Court's precedent, the court below relied upon three obscure cases, none having ever received one positive citing and one pre-*Gertz/Rosenbloom*-era case not cited since 1973.[5] (*Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971). (App., *infra*, 46a-49a).

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[5] *Bowman v. Heller*, 420 Mass. 517, 523 n.7, 651 N.E.2d 369, 374 n.7 (Mass. 1995); *Jones v. Taibbi*, 400 Mass. 786, 797-98, 512 N.E.2d 260, 267-68 (Mass. 1987); *Alaska Statebank v. Fairco*, 674 P.2d at 294; *Tripoli v. Boston Herald-Traveler Corp.*, 359 Mass. 150, 156, 268 N.E.2d 350, 353-54 (1971).

IV. More Than Thirty Years Ago This Court Instructed Lower Courts on Standard for the Determination of Limited Purpose Public Figure Status Leaving Open the Equally Important Question of Whom the Constitution Guarantees Media Defendant Protection

A. The Reach of the Constitutional Protection of Media Defendants Remains Undefined

Thirty years ago, when faced with the issue of the reach of the constitutional protection of media defendants, this Court chose not to consider whether the *New York Times* (*New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)) standard applied to an individual defendant rather than to a media defendant. *Hutchinson*, 443 U.S. at 134 n.16 (dismissing the actual malice standard on defamation plaintiff's private person status). Far before *Hutchinson*, in the 1938 *Lovell* decision, the Court touched upon the issue of defendant's status defining one aspect thereof by instructing that "[t]he liberty of the press is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets." *Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938).

In *Babbitt*, decided weeks prior to *Hutchinson*, the Court specifically pointed out that its ruling had no bearing on "the role of the First Amendment in suits by private parties against nonmedia defendants." *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 309 n.16 (1979). Then, after *Hutchinson*, the Court again avoided the question by clarifying that

the holding did not require it to consider "what standards would apply if the plaintiff sues a nonmedia defendant." *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 779 n.4 (1986). Again in *Milkovitch*, the Court, quoting *Hepps*, "reserved judgment on cases involving nonmedia defendants." *Milkovitch v. Lorain Journal Co.*, 497 U.S. 1, 20 n.6 (1990).

Thus, although for forty years this Court has recognized the issue as one that at some point in time needs clarification, it has avoided the issue by deciding the question at hand on other grounds. Petitioner respectfully suggests that the time is ripe, and that it is of compelling interest for this Court now to resolve the issue by granting this Petition.

B. Constitutional Characteristics of a Limited Purpose Public Figure

Since *Gertz*, the seminal issue in the majority of defamation cases has been the designation of otherwise private individuals as limited purpose public figures. In *Gertz* and the three cases following it over the next five years, this Court developed a two-part inquiry procedure determining when a private person is transformed into a limited purpose public figure by analyzing: (1) whether the issue of the alleged defamatory statements is one of public controversy; and (2) whether the nature and extent of defamation plaintiff's prior participation in that very controversy was such as to warrant public figure status. *Gertz*, 418 U.S. at 351.

Prior to *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), courts strongly favored the interest in protecting an individual's reputation on behalf of the First Amendment's protection of free speech. The *New York Times* Court set a new standard significantly changing this balance. Hereinafter, in order for "public officials" to prevail in defamation suits, they must establish "actual malice" with convincing clarity. *Id.* at 285-86.

Following *New York Times*, the Court initially expanded the group of individuals to be included under the "actual malice standard." The Court in *Rosenblatt v. Baer*, 383 U.S. 75, 85-86 (1966), designated as "public official" at least all those government employees "who have, or appear to have, substantial responsibility for or control over the conduct of governmental affairs." This Court next in *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 162 (1967) extended the area subjected to the "actual malice" standard beyond "public officials" to include non-official "public figures" like a famous football coach. Finally, in *Rosenbloom*, the "actual malice" area reached its climax. The Court subjected to the "actual malice test" non-public private individuals whose speech involved issues of public or general concern. *Rosenbloom v. Metromedia, Inc.*, 403 U.S. at 43-44.

The constitutional balance proposed by the *Rosenbloom* plurality was unequivocally rejected by the Court in *Gertz*, 418 U.S. at 346. There, the Court instructed that the extension of the *New York Times* standard to include private persons would abridge

such persons' interests "to a degree that we find unacceptable." *Id.* The Court next introduced a classification system for lower courts to follow, instructing that there are three major classes of public figures. The third, and for this petition relevant class, consists of persons who "have thrust themselves to the forefront of a particular public controversy[6] in order to influence the resolution of the issues involved." *Id.* at 345, 351.

This Court's opinions provide two justifications for advancing First Amendment protections to defamatory speech against public officials, general, and limited purpose public figures. First, public officials and figures are less deserving of protection from defamatory speech because they have voluntarily exposed themselves to an increased risk of injury from such speech. *See Wolston*, 443 U.S. at 164; *Gertz*, 418 U.S. at 345. Second, public figures are less vulnerable to injury from defamatory speech because through their prior participation in the controversy intended or calculated to influence its outcome, they have already acquired an effective access to the media. Thus, they are more able than private persons to effectively counter, criticize, and expose falsehoods. *Gertz*, 418 U.S. at 344 (emphasis added).

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[6] Without providing an express definition of its word of choice, the Court here exchanged the words "interest" and "concern" for the word "controversy," which in plain English bears a significantly different and narrower meaning as clarified by the Court in subsequent cases.

As recognized by a shrinking majority of federal and state appeals courts, the three above-cited Supreme Court cases following *Gertz* have further refined, clarified, and narrowed the group of people who under the Constitution can be transformed from private persons to public figures.[7] Specifically, those cases have focused on the above third class and categorized those persons as "limited purpose public figures." *See generally Wolston*, 443 U.S. 157; *Hutchinson v. Proxmire*, 443 U.S. 111 (1979); *Time, Inc. v. Firestone*, 424 U.S. 448 (1976). Determining whether a defamation plaintiff is a limited purpose public figure, this Court further developed the *Gertz* two-part test: First, did a particular public "controversy" lead to the alleged defamation, and second, was the nature and extent of the plaintiff's participation in that particular controversy such as to justify public figure status. *See Wolston*, 443 U.S. at 166-69; *Hutchinson*, 443 U.S. at 134-36; *Firestone*, 424 U.S. at 453-55.

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[7] "[I]n the aftermath of *Gertz*, the Supreme Court undertook a series of refinements of the 'limited' public figure, consistently giving the term an application more restricted in scope than the simple word 'public' might suggest as a matter of popular colloquial usage." *Foretich v. Capital Cities/ABC, Inc.*, 37 F.3d 1541, 1553 (4th Cir. 1994) (quoting 1 Rodney A. Smolla, *Law of Defamation*, §2.08 at 2-23 (1993)).

C. What Constitutes a Public Controversy Under the First Amendment

In the first of this trilogy of precedential cases, *Firestone*, the controversy was the divorce of Mary Allen Firestone from the heir of the Firestone family, Russell Firestone. The couple exchanged fierce accusations of sensational character, which the media heavily reported, but this Court refused "to equate 'public controversy' with all controversies of interest to the public." *Firestone*, 424 U.S. at 454. Thus, although a dispute is litigated and creates heavy media attention, it is not sufficient to render the dispute a public controversy. *Id.* at 453-57.

Next, in *Hutchinson*, a researcher who had received federal funding for animal studies sued United States Senator Proxmire for defamation after Proxmire had published defamatory statements about the value of Hutchinson's research. Proxmire argued, *inter alia*, that Hutchinson became a limited purpose public figure for the limited purpose of comment on his receipt of federal funding for research projects when defending himself in the media. The Court clarified the nature of a public controversy through its finding that "[r]espondents have not identified such a particular controversy; at the most, they point to concern about general public expenditures . . . but [that] is not enough to make Hutchinson a public figure." *Hutchinson*, 443 U.S. at 135. Further, the Court warned that the use of subject-matter classification to determine whether the issue is one of public

controversy "too often results in an improper balance between competing interests in this area." *Id.*

In *Wolston*, the last of the public figure trilogy, the plaintiff sued the author and publisher of a book that falsely identified him as a Soviet agent. The *Wolston* Court overturned the lower court's finding that Wolston was a limited purpose public figure having thrust himself into the forefront of a particular public controversy and held that the controversy, Soviet espionage, was not a public controversy. *Wolston*, 443 U.S. at 160. Although in *dicta*, Justice Rehnquist offered an indication that an element of divisiveness is necessary to turn an interest or concern into a controversy. *Id.* at 167 n.8.

No defamatory action has received more media attention than the child custody dispute in *Foretich*, 37 F.3d at 1455. The custody battle, *inter alia*, raised several substantial questions for public debate, which ultimately prompted Congress and the President to act through federal legislation. Thus, the court held that the custody battle became a public controversy. *Id.*

Moreover, in all post-*Gertz* cases, this Court has made it unequivocally clear that the public controversy must pre-exist the defamation and that to become a limited purpose public figure the defamation plaintiff must have thrust himself into that controversy prior to the defamatory statements. *Wolston*, 443 U.S. at 166; *Firestone*, 424 U.S. at 134-35 (emphasis added). Furthermore, a public controversy

must be a real dispute, the outcome of which affects the public or some segment of it in an appreciable way. *See, e.g.*, *Waldbaum v. Fairchild Publ'ns, Inc.*, 627 F.2d 1287, 1296 (D.C. Cir. 1980) (quoting *Firestone*, 424 U.S. at 454-55).

D. Constitutional Requirements for the Nature and Extent of Participation in a Public Controversy to Transform a Private Person into a Public Figure

In *Gertz*, the Court stated that "[t]he first remedy of any victim of defamation is self-help using available opportunities to contradict the lie or correct the error and thereby minimize its adverse impact on reputation." *Gertz*, 418 U.S. at 344. The Court further acknowledged that public figures are better equipped to engage in such self-help than are private figures. *Id.*; *see also Wolston*, 443 U.S. at 164. The determination of whether a person is a limited purpose public figure must therefore focus on the nature and extent of that person's participation in a public controversy. *Wolston*, 443 U.S. at 167. Specifically, the defamation plaintiff must have thrust himself into that public controversy prior to the alleged defamation and must have done so with the intent to or calculated to influence the outcome of that very controversy. *Id.* at 168 (emphasis added); *see also Hutchinson*, 443 U.S. at 135.

In *Firestone*, the wife herself held press conferences during the divorce proceedings attempting to

satisfy reporters. The Court found that through those "[she] assumed no special prominence in the resolution of public questions." *Firestone*, 424 U.S. at 454-55. The Court further held that those press conferences could not turn her into a limited purpose public figure since "[s]uch interviews should have had no effect upon the merits of the legal dispute between respondent and her husband or the outcome of that trial." *Id.* at 455 n.3. The Court, in addition, found that "there is no indication that she sought to use the press conferences to thrust herself into some unrelated controversy [beside her legal dispute with her husband] in order to influence its outcome." *Id.* at 455.

In *Hutchinson*, this Court found the defamation plaintiff "at no time assumed any role of public prominence in the broad question of concern about expenditures." *Hutchinson*, 443 U.S. at 135. The Court also concluded that his access to media was limited to responding to the issue giving rise to the alleged defamation, and thus "[h]e did not have regular and continued access to the media that is one of the accouterments of having become a public figure." *Id.* at 136. He and his writings became a controversy only because of the defamatory speech by Respondents. *Id.* at 135. The Court consequently instructed that there can be no bootstrapping – "[c]learly those charged with defamation cannot by their own conduct, create their own defense by making the claimant a public figure." *Id.* (quoting *Wolston*, 443 U.S. at 167-68).

In *Wolston*, this Court disagreed with the lower court's finding that Wolston became a public figure by his own voluntary actions that invited public attention and emphasized that courts must focus on the nature and extent of an individual's participation in the particular controversy that gave rise to the defamation. *Wolston*, 443 U.S. at 165-67. The Court instead found that, since his actions giving rise to the controversy were "in no way **calculated** to draw attention to himself in order to invite public comment or influence the public with respect to any issue," and since he "never discussed the broad subject matter with the press and limited his involvement to that necessary to defend himself," he was not a limited purpose public figure. *Id.* at 168, 176 (emphasis added). To hold that private individuals can become public figures by attempting "to obtain the only redress available to them to defend themselves against actions brought . . . by others . . . would create an open season for all who sought to defame persons convicted of a crime." *Id.* at 169.

In *Foretich*, the Court of Appeals for the Fourth Circuit conducted a comprehensive examination of the nature and extent of the grandparents' participation in the Morgan-Foretich child custody dispute. After first having conducted an all-inclusive review of relevant Supreme Court precedent, the court introduced a five-part test adhering to those principles. *Foretich*, 37 F.3d at 1556. The defamation defendant argued that the grandparents "voluntarily participated in the public controversy when speaking with

news reporters, and by appearing on television, at press conferences, and at public gatherings . . . aimed at swaying public opinion in favor of their son against his former wife." *Id.* at 1557. Since Dr. Morgan had previously launched a series of public accusations against the grandparents involving sexual child abuse, plaintiffs had a right to respond without risking becoming limited purpose public figures, and they were not public figures because their public statements and actions were made predominantly in self-defense. *Id.* at 1558.

The court also clarified that plaintiffs' speech was proper since statements that simply "deny the accusations and statements that impugn the motive of the accuser are certainly responsive." *Id.* at 1560. Moreover, equally responsive are statements including "[h]onest indignation and strong words,"[8] "colorful verbiage,"[9] and even hyperbole and "exaggerated statements" of fact[10] all may be uttered in self-defense. *Id.* at 1562. To make plaintiffs public figures would create an open season for all who sought to defame them not just limited to defamation defendant. *Id.*

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[8] *Dickins v. Int'l Bd. of Teamsters*, 171 F.2d 21, 25 (D.C. Cir. 1948)

[9] *Mosrie v. Trussell*, 467 A.2d 475, 478 (D.C. 1983)

[10] *Id.* at 479.

REASONS FOR GRANTING THE PETITION

I. There Is a National Interest in Clarifying Now that the First Amendment Does Not Invest in Foreign Multinational Corporations the Same Immunities as it Guarantees a Media Defendant Against Liability in Defamation Actions

The general public, political, and economic commentators alike agree that the greatest challenge our nation has faced since the World War II is to recover from the present recession. As do the executive and legislative branches of government. Likewise, there is general agreement that the financial meltdown was propelled by a series of corporate financial scandals, which all could have been avoided. Although federal government and legislators across party lines attempt to provide increased oversight of the corporate sector, this alone is not the solution. Also needed is a higher degree of corporate transparency and self-regulation.[11] But, during the last fifteen to twenty years, corporate transparency has become increasingly absent. Corporate executives have become reluctant to speak out and the ceiling for internal criticism has become alarmingly low. The few

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[11] *See, e.g.*, Michael Herman, *Corruption helped cause financial crisis*, TIMES ONLINE, Sept. 23, 2009, http://business.timesonline.co.uk/tol/business/economics/article6846790.ece; *see generally* Posting of Richard Posner to The Becker-Posner Blog, http://www.becker-posner-blog.com/archives/2008/09/the_financial_c.html (Sept. 21, 2008, 9:15 A.M.).

that have dared to voice concern about misguided corporate strategies and risky adventures have been severely punished.

Indeed, launching smear campaigns to silence unwanted critics or potential whistle blowers has become a lucrative business. Beginning with the incidents at Brown & Williams, where upon finding itself in a legal dispute with a former top executive, it hired one of the nation's leading private investigation firms to commence a smear campaign against its former research executive, Jeffrey Wigand.[12] The result consisted of a five-hundred-page report, which was shared with the media to impeach Wigand as a witness. "This [launching a smear campaign] is increasingly becoming an important and frequent tool when designing a media strategy," according to Ben Kincannon, Senior Partner of Strategy XXI.[13] Kincannon adds that my company "has an interest in spreading disparaging information about an individual if that would favor a client of ours. It is of course beneficial to impact the public early on to reach potential jurors and judges, who will later

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[12] Rick Lyman, *A Tobacco Whistle-Blower's Life is Transformed*, N.Y. TIMES, Oct. 15, 1999, at A24.

[13] Strategy XXI and Kincannon were engaged by Respondent's parent company in January 1996 just at the onset of *Business Week*'s interest in Respondent and Petitioner. The referenced interview with Kincannon was published just as the journalist Marc Maremont sent a letter to the parent company outlining his article about Respondent and Petitioner.

handle the case at court." *Business Monthly*, March 1996.[14]

Strategy XXI and Kincannon are not alone, in the wake of this Court's silence concerning the limitations of protection extended to nonmedia defamation defendants, an entirely new consulting industry, targeting foreign nonmedia American subsidiaries, has been created and is thriving. For the last fifteen years, consulting companies have offered their services abroad to foreign companies to circumvent the American legal system. These "pre-trial impact" consultants market their professionally organized and executed media campaigns to influence the public opinion in anticipation of legal disputes just like Kincannon announced on a promotional tour in Sweden in January 1996.

The protection of and support of foreign nonmedia companies' intervention in the U.S. legal system circumventing the U.S. rule to try cases inside the courts is bound to severely damage the U.S. trial process. In a global economy, it is unwise to leave the question of silencing outspoken executives to overseas headquarters in London, Moscow, and Beijing. Such a scenario would have disastrous effects on the welfare of the U.S. economy when corporate transparency and self-regulation are needed most to bring the nation out of a serious recession created in part by an

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[14] This is from a quote in an interview by a Swedish business magazine, Lennart Pehrson, *Business Monthly*, March 1996, that has since ceased publication.

under-regulated corporate sector and silenced executives declining to speak out.

Without the protection of defamation plaintiffs' right to sue a nonmedia defendant under the negligence standard, the corporate sector can effectively silence all persons under its authority without redress. A corporation only need engage a professional "pre-trial impact" consultant team to organize a media smear campaign focusing on the stories *du jour*[15] to have the case tried under the theory of "give a dog an ill name and hang him." *Olinger v. Comm'r of Internal Revenue*, 234 F.2d 823, 824 (5th Cir. 1955).

This compelling issue is ripe for review now. In the case at hand, the lower court's vesting in a nonmedia foreign corporate defamation defendant and its foreign non-resident executives armed with professional "pre-trial impact" consultants the same constitutional protection as the First Amendment guarantees a media defendant is entirely counter-productive to important national interests. In addition, such protection and support of foreign influence cannot be read into the language of the First Amendment nor can it be suggested to have been intended by the drafters of the amendment. It is therefore compelling and urgent for this Court now to clarify that this abuse of American freedom and liberty has ended. In times

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[15] Like the widespread issues of the mid-nineties concerning sexual, race, and age harassment in the workplace or of Nazi and other politically loaded sympathies.

when resolving this issue is of extraordinary national interest, this Court alone can resolve this urgent need for constitutional clarification.

II. There Is a Compelling Need Now to Reinforce the Standards Set by This Court Defining when a Defamation Plaintiff Is a Public Figure in Response to Lower Courts' Ignorance of Supreme Court Precedent

With the Court's analysis in *Gertz* and the subsequent further clarification and particularization it seemed like this Court had succeeded in its objective to avoid "an *ad hoc* resolution of the competing interests at stake in each particular case" by "lay[ing] down broad rules of general application." *Gertz*, 418 U.S. at 343-44. Still, this Court's silence on the issue for more than a quarter century has hollowed the once consistent standard, which has "lead to unpredictable results and uncertain expectation, and . . . could render [this Court's] duty to supervise the lower courts unmanageable." *Id.* at 343.

A. There Is a Growing Split Among and Between Federal and State Courts as to what Constitutes a Public Controversy and what Degree of Public Participation in a Particular Controversy Is Necessary to Designate an Individual as a Public Figure

Most leading libel commentators today agree with the *Gertz* Court's concern and make the case

that lower courts have reached a level of unmanageable uncertainty. *See, e.g.*, Bruce W. Sanford, *Libel and Privacy* §7.3.1, 7-58 (2d ed. 1994; Supp. 2004) (labeling the *Gertz* public figure rules a "failure" and a "dismal" flop "seem[ingly] incapable of rendering consistent results in a multitude of disparate factual situations."); 1 Rodney A. Smolla, *Law of Defamation*, §2:21, 2-32 (2d ed. 2000) (distinguishing between public and private figures "is like trying to nail a jelly fish to the wall," quoting *Rosanova v. Playboy Enterprises, Inc.*, 411 F. Supp. 440, 443 (S.D. Ga. 1976) *aff'd*, 580 F.2d 859 (5th Cir. 1978)); 1 Robert D. Sack, *Sack on Defamation*, §5.3.6, 5-39 (3d ed. 2004) (stating that divergent case law in the state and lower federal courts makes the determination of a defamation plaintiff's status an uncertain process, differing from state to state and court to court); Laurence H. Tribe, *American Constitutional Law*, §12-12, 865 (2d ed. 1988) (commenting that, "the doctrine has become a frustrating tangle for all concerned – a mysterious labyrinth for those seeking to clear their names and a costly and unpredictable burden for the speakers the First Amendment is designed to protect.").

Although there is a widening split between federal and state courts, most have recognized the above-cited Supreme Court precedent. Many are applying the test for a limited purpose public figure first introduced by the D.C. Circuit in *Waldbaum*. 627 F.2d at 1296-98, *cert. denied*, 449 U.S. 898 (1980) (clarifying that "[r]ather a public controversy is a dispute that in fact has received public attention because its ramifications will be felt by persons who are not direct participants."); *see also Foretich*, 37

F.3d at 1553 (holding that when the dispute prompted Congress and the President to intervene through federal legislation, that dispute amounted to a public controversy).

An increasingly shrinking majority of federal circuit courts and state supreme courts still follow the threshold requirement of identifying an actual public controversy also suggested in *Waldbaum*. *Waldbaum*, 627 F.2d at 1296; *see, e.g.*, *Wayment v. Clear Channel Broad., Inc.*, 2005 UT 25 ¶¶ 28-33, 116 P.3d 271, 282-83 (Utah 2005); *Lundell Mfg. Co. v. Am. Broad. Cos.*, 98 F.3d 351, 363 (8th Cir. 1996); *Clyburn v. News World Commc'ns, Inc.*, 903 F.2d 29, 31 (D.C. Cir. 1990) (applying *Waldbaum* limited purpose public figure test); *Lerman v. Flynt Distrib. Co.*, 745 F.2d 123, 137 (2d Cir. 1984), *cert. denied*, 47 U.S. 1054 (1985); *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583 (1st Cir. 1980) (holding that advertising and pro-business promotional efforts are not to be equated with public controversies); *Rosanova*, 580 F.2d at 860.

Yet still, other courts have failed to recognize or ignored this Court's precedent. *See, e.g.*, *Bowman*, 420 Mass. 517, 651 N.E.2d 369 (paying lip service to Supreme Court post-*Gertz* precedent and the *Waldbaum* three-step test); *Lohrenz v. Donelly*, 541 U.S. 1042 (2004) (holding that a female naval aviator became a limited purpose public figure when volunteering for a combat-ready assignment although not seeking publicity through any media activities); *Marcone v. Penthouse Int'l Magazine for Men*, 754 F.2d 1072 (3d Cir. 1985) (holding attorney was a limited purpose public figure when taking motorcycle trips with gang

members without seeking to influence the public controversy of drug trafficking); *Rosanova v. Playboy Enters.*, 580 F.2d 859, 860 (5th Cir. 1979) (voluntary acts bound to invite attention without participating to influence outcome of a public controversy made defamation a public figure); *Cottrell v. Nat'l Collegiate Athletic Ass'n*, 128 S. Ct. 1334 (2007) (mem.) (assistant football coaches became limited purpose public figures although prevented from denying and rebutting accusations through a gag order issued by the defendant); *Miles v. Sierra Club*, 546 U.S. 1091 (2005) (mem.) (holding that arguably unrelated conduct prior to the defamatory speech made a private person a limited purpose public figure); *Alaska Statebank*, 674 P.2d 288 (invoking the public figure through "bad behavior" doctrine without attempts or intent by the defamed to influence the public).

Specifically, a number of lower courts are in direct conflict with this Court's instructions that a high degree of public activity is necessary to become a limited-issue public figure as instructed by *Gertz*[16] *and Wolston*.[17] *See, e.g.*, *Miles*, 546 U.S. 1091; *Lohrenz v. Donelly*, 350 F.3d 1272, 1272-82 (D.C. Cir. 2003); *Marcone*, 754 F.2d 1072; *Clyburn*, 903 F.2d 29.

Lower courts just do not accept the standards imposed through this Court's precedent and plainly ignore the analysis conducted in these cases. Without renewed guidance from this Court, a growing number

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[16] *Gertz*, 418 U.S. at 352.

[17] *Wolston*, 443 U.S. at 167.

of lower courts will continue to require private individuals to meet the heavy burden of the *New York Times* actual malice standard even though they engage in no public conduct or make no public effort to influence the outcome of a prior controversy contrary to this Court's instructions in *Gertz*. *See also Wolston*, 443 U.S. at 166; *Firestone*, 424 U.S. at 134-35. It is therefore proper for this Court to grant this Petition to provide lower courts clarification and further guidance.

III. There Is a Compelling Need to Correct Federal Constitutional Errors Made by the Supreme Judicial Court of Massachusetts Ignoring Every Instruction from This Court

The rulings of the Massachusetts Supreme Court in public figure cases are varied, to the point of representing an absolute paradigm of inconsistent and unpredictable *ad hoc* resolutions. In a 1985 case, after first having recognized this Court's authority, the court held that "the plaintiff was a limited purpose public figure as a matter of law because he 'voluntarily thrust himself into the controversy by campaigning for [a union election].'" *Materia v. Huff*, 394 Mass. 328, 331, 475 N.E.2d 1212, 1215 (1985).

Still, ten years later, the court again faced the same issue. *Bowman*, 420 Mass. 517, 651 N.E.2d 369. As in *Materia*, the court quotes and cites relevant authority and announces its inquiry into plaintiff's

status as a *Waldbaum* test. *Id.* at 522-25, 651 N.E.2d at 373-74. Then, under the vehement protest of two dissenting Justices, the majority held that a union election is not a public controversy because others besides the participants will not feel the outcome. *Id.* at 525 (quoting *Wolston*, 443 U.S. at 167). Thus relying on the same instructions from this Court, the Massachusetts court, without attempting to distinguish the cases or indicating a setting aside of a prior opinion, delivered two irreconcilable opinions.

In the case at hand, although announcing its reasoning as a two-part *Gertz* test, the court for the first time in its opinions did not rely on Supreme Court post-*Gertz* precedents but instead on four obscure, never cited cases, one of which is a pre-*Gertz*/*Rosenbloom*-era case. (App., *infra*, 46a-49a). This indicates that this Court's supervision of lower courts has become unmanageable. Although the court cites the above *Bowman* case, it reaches a diametrically opposite conclusion when basing its finding on a misplaced general subject-matter analysis instead of adhering to the "nature and extent" inquiry as instructed by this Court. In addition to ignoring this Court's authority, the lower court's opinion is not only irreconcilable with its own precedent, but also squarely against First Circuit jurisprudence.[18]

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[18] *See Bruno & Stillman, Inc.*, 633 F.2d 583. After a comprehensive analysis of *Gertz*, and the following trilogy of seminal cases together with *Waldbaum*, the *Bruno & Stillman* court held

(Continued on following page)

A. Public Controversy

This Court has repeatedly defined how a private individual must engage the public in order to become a limited-purpose public figure. First, this Court has made it unmistakably clear that unless there is a public controversy there can be no limited purpose public figure. *Wolston*, 443 U.S. at 165-67; *Gertz*, 418 U.S. at 351-52. Second, defamation plaintiff's participation in the public controversy must have taken place **prior** to the alleged defamation. *Wolston*, 443 U.S. at 167 (emphasis added); *Hutchinson*, 443 U.S. at 135. Time after time this Court has instructed that issues of general interest and concern are not to be equated with public controversies. A public controversy must entail elements of divisiveness. *See Wolston*, 443 U.S. at 167; *Hutchinson*, 443 U.S. at 135; *Firestone*, 424 U.S. at 454; *Waldbaum*, 617 F.2d at 1297; *compare Foretich*, 37 F.3d at 1555 (holding that when public dispute prompted Congress and the President to intervene through federal legislation, then the public dispute amounted to a public controversy).

Here, Petitioner's participation was not aimed at the broad issues recognized as of general concern (App., *infra*, 47a), not public controversy, but limited to defending himself involving the narrow issue of his guilt only. (App., *infra*, 46a-49a). The lower court did

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that promotional activities promoting one's own image does not transform a company to a limited purpose public figure. *Id.*

not even attempt to equate those concerns with a public controversy just as this Court found that government spending and Soviet espionage were not. *See Wolston*, 443 U.S. at 160. The outcome of the dispute concerning Petitioner's guilt, in fact, was not felt by anyone but the parties involved. This is demonstrated by the absence of any considerable media coverage when all civil actions brought by individual former Astra USA employees after the publication of the *Business Week* article were subsequently dismissed on the merits without any finding of wrongdoing against Petitioner,[19] which likewise went unnoticed by the court below. (App., *infra*, 46a-49a). Since the truthfulness of Respondents' accusations never was a public controversy, once Petitioner had prevailed, his whereabouts were no longer newsworthy and no

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[19] In *Zortman v. Astra USA, Inc.*, No. 96-2529 (Suffolk Cty. Super. Ct.), the court struck the allegations of sexual harassment and other conduct by Petitioner, ruling that they were "scandalous" in nature and the case was resolved and dismissed. In *Dorn v. Astra USA, Inc.*, No. 96-11124-MEL (D. Mass.) all claims against Petitioner were dismissed when six former employees of Astra USA claimed that they had been the victims of a pattern of covering up sexual harassment by top ranking company officers, the court dismissed all claims against Petitioner. *See also Dorn v. Astra USA, Inc.*, 957 F. Supp. 388 (D. Mass. 1997); *Strobel v. Astra USA, Inc.*, No. 97-10171-EFH (D. Mass.) (dismissing case where plaintiff's sole claim against Petitioner was that he allegedly condoned the harassment, after filing case, was dismissed with prejudice for Petitioner); *Barouch v. Astra USA, Inc.*, No. 96-02189 (Norfolk Cty. Super. Ct.) (dismissing the entire case claiming sexual harassment by Petitioner and others as well as an environment of condoning sexual harassment and retaliation).

media outlet ever contacted him to hear his side of the story. Of interest and pointing to inefficient media access is that Petitioner prevailed in all actions where the accuser had to appear at court to be tested for veracity and truthfulness. On the contrary, in the *Astra* action, the court, against Massachusetts law, granted Astra blanket protection against *ex parte* interviews and allowed alleged victims to testify through video deposition avoiding confrontation before the jury, which also raises serious questions about Petitioner's constitutional right to due process.

The lower court embarked on a misguided and unconstitutional analysis when it shifted the focus of its inquiry from the nature and extent of Petitioner's participation in a public controversy to the public's interest in a broad issue of general concern squarely against the "nature and extent" standard established in *Gertz* and its progeny. *See Gertz*, 418 U.S. at 351; *see also Wolston*, 443 U.S. at 160; *Hutchinson*, 443 U.S. at 134-36; *Firestone*, 424 U.S. at 455.

B. Nature and Extent of Petitioner's Participation in a Particular Controversy

This Court has made it clear that defamation plaintiff's participation in a particular public controversy must have been **calculated** to draw attention to himself in order to invite public comment or influence the public with respect to the issue. *See, e.g.*, *Wolston*, 443 U.S. at 168. Specifically, the D.C. Circuit has defined that: "a person has become a

public figure for limited purpose if he is attempting to have, or realistically can be expected to have, a **major** impact on the resolution of a specific public dispute that has foreseeable and **substantial** ramifications for persons beyond its immediate participants." *Waldbaum*, 627 F.2d at 1292 (emphasis added) (cited with approval by the United States Supreme Court in a footnote to the Court's summary judgment decision in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 246 n.3 (1986)).

The court below based its findings on Petitioner's participation on two press releases issued by counsel denying and rebutting Respondents' attacks. (App., *infra*, 48a-49a). In addition, it makes a major point of the verbiage used in those denials, *id.*, and of counsel's aborted attempts to create fair media attention questioning the truthfulness of the attacks. Additionally, the lower court emphasized counsel's failed attempts to have a rebuttal broadcasted by CBS News.[20] The record is clear that Petitioner never held a press conference nor did he give any interview or appeared on television. He never discussed the broad subject matter with the press and issues the court recognized as of general concern. In fact, his participation was limited to that necessary to defend himself, and his counsel's two press releases had no

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[20] Representative of the lower court's analysis is a footnote where the court advances the misguided proposition that unsuccessful attempts to get efficient media access are characteristics of a public figure. (App., *infra*, 25a n.44).

influence whatsoever on the merits of the legal dispute between Petitioner and Respondents. *See Wolston*, 443 U.S. at 168; *Firestone*, 424 U.S. at 454-55. In fact, he never sought to thrust himself into or assumed a special prominence in the resolution of the broad issues recognized as general concerns. Furthermore, none of Petitioner's actions prior to Respondents' defamation was **calculated** to or **intended** to draw attention to himself to influence the public on any issue. On the contrary, Petitioner was overwhelmed and defenseless against Respondents' professional "pre-trial impact" consultants' media campaign and became "the dog with an ill name." *Olinger*, 234 F.2d at 824.

The lower court's reasoning is expressly at odds with this Court's opinion in all cases decided since *Gertz*. Directly against this Court's express warnings against subject-matter classifications, the linchpin of the lower court's analysis became the size and importance of the subject matter involved in Respondents' libelous speech. (App., *infra*, 46a-49a); *contrast Hutchinson*, 443 U.S. at 135. This analysis is just as unconstitutional as that applied by the plurality in *Rosenbloom*, 403 U.S. at 43-44. Unnoticed or disregarded by the lower court is that this Court rejected the *Rosenbloom* standard in *Gertz*, 418 U.S. at 343, rejected it again in *Firestone*, 424 U.S. at 456, and yet again in *Wolston*, 443 U.S. at 167-68.

The First Amendment framework that this Court has established for defamation claims required the court below to hold that Petitioner was a private

figure not subject to the *New York Times* actual malice standard. In fact, the lower court's opinion circumvents forty years of this Court's jurisprudence taking the constitutional balance of competing First Amendment interests back to the over and over again rejected *Rosenbloom* standard. In fact, the lower court's reasoning and reliance on one overruled Supreme Court case and four obscure cases, none ever cited with approval, to circumvent forty years of constitutional jurisprudence makes a nullity out of this Court's supervisory power and is so clearly erroneous that this Court's power under 28 U.S.C. §2106 might be properly invoked.

CONCLUSION

There are three reasons why the issues addressed in this Petition are appropriate for the Court's review. First, the issues are ripe for resolution, especially the application of media defendant standard to a foreign corporation and its foreign nonresident executives. Second, the opinion of the Supreme Judicial Court of Massachusetts conflicts with this Court's precedent on every aspect of the limited purpose public figure designation in defamation cases and so represents the inconsistent and unpredictable *ad hoc* resolutions that increasingly have become the norm of lower court's rulings on the issue.

A denial of certiorari in this case would be most unfortunate. Although without creating precedence and without legal meaning, a denial will undoubtedly lead people within the business community to believe that this Court is approving the balancing of constitutional rights (back to pre-*Gertz* times) upheld in the decision below. In view of the urgent national need now to clarify the unresolved issue of defining to whom the Constitution grants the status of media-defendant and of the conflict of the decision below with past decisions of this Court and the eroding recognition among lower federal and state courts of this Court's authority, the Court may wish to consider summary reversal.

Respectfully submitted,

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914 N.E.2d 36

Supreme Judicial Court of Massachusetts,
Suffolk.
ASTRA USA, INC.
v.
Lars P.E. BILDMAN;
Carl-Gustaf Johansson & others,[1]
third-party defendants (and a companion case[2]).

SJC-10361

Argued May 5, 2009.
Decided Oct. 5, 2009.

Jeffrey S. Robbins, Boston (Joseph D. Lipchitz & A.W. Phinney, III, with him) for Astra USA, Inc.

Rebecca P. McIntyre & Michael D. Weisman, Boston, for Lars P.E. Bildman.

David E. McCraw, New York, NY, & Jonathan M. Albano, Carol E. Head, & Shuan Lue, Boston, for Globe Newspaper Company, Inc., amicus curiae, submitted a brief.

Present: MARSHALL, C.J., IRELAND, SPINA, COWIN, & BOTSFORD, JJ.

MARSHALL, C.J.

A Superior Court jury found Lars P.E. Bildman liable to his former employer, Astra USA, Inc.

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[1] Astra AB and Hakan Mogren.

[2] Lars Bildman *vs.* Hakan Mogren & others.

(Astra),[3] for fraud, conversion, waste of corporate assets, breach of fiduciary duty, and sexual harassment of Astra employees, and awarded Astra damages in the aggregate amount of $1,040,812. The same jury found Astra not liable to Bildman for breach of a 1993 employment agreement between the parties (employment agreement), but awarded Bildman $203,691 in damages related to a March, 1996, supplemental stock grant. The jury returned verdicts against Bildman on his claims of intentional interference with contract against Hakan Mogren and Carl-Gustaf Johansson, two officials of Astra's Swedish parent corporation, Astra AB. Prior to trial, the judge dismissed on summary judgment Bildman's claim for attorney's fees and costs (attorney's fees) under the employment agreement and his libel action against Astra, Mogren, and Johansson; she also ruled that Astra could not rescind the employment agreement. Following a posttrial evidentiary hearing, the judge ruled that Astra could not recover by forfeiture the compensation it paid to Bildman from 1990 through his termination in June, 1996, the period in which he breached his fiduciary obligations to Astra.

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[3] At all relevant times, Astra USA, Inc. (Astra), was a wholly owned subsidiary of Astra AB, a Swedish corporation. Presently, according to Astra, Astra is "a wholly-owned subsidiary of AstraZeneca Treasury Limited, which is, in turn, owned by AstraZeneca UK Limited, a subsidiary of AstraZeneca Intermediate Holdings Limited. AstraZeneca PLC, a publicly traded company, owns AstraZeneca Intermediate Holdings Limited. . . ."

Final judgment on all claims of all parties in the consolidated actions entered on January 30, 2006. Following the denial of Bildman's motion for judgment notwithstanding the verdict or alternatively for a new trial, and his motion to alter or amend the final judgment, the parties cross-appealed. We transferred the case here on our own motion.

Five questions emerge on appeal from this lengthy and complex trial. Three are presented by Astra: (1) Did the Superior Court judge err in ruling that Astra was *not* entitled to rescind the employment agreement? (2) Did the judge err in the manner in which she applied New York law to the forfeiture issue? (3) Did the judge err in not allowing Astra to recover damages from Bildman for its costs of investigating charges of sexual harassment at Astra by Bildman and others? Bildman presses two issues on appeal: (4) Did the judge err in ruling that Astra had no obligation to pay Bildman's legal fees and costs in the consolidated actions? (5) Was summary judgment properly entered against Bildman on his libel claims?

On review of the voluminous record and the judge's orders and well-reasoned memoranda of decision, we affirm the judgments against Astra on the issues of rescission and recovery of its sexual harassment investigation costs. We also affirm the judgments against Bildman on the issues of his attorney's fees and his libel claims. We reverse the judgment denying Astra recovery of compensation it paid to Bildman during the period of his disloyalty –

$5,599,097 in salary and $1,180,000 in bonuses. We affirm the jury's verdict awarding Bildman $203,691 in damages related to the supplemental stock grant, because on appeal Astra has waived any claim of forfeiture of that award. As we explain more fully below, the judge's forfeiture rulings are incompatible with the law of New York, the State where Astra is incorporated,[4] which in the circumstances of this case requires forfeiture of the salary and bonuses Bildman earned during the period of his disloyalty. We remand the case to the Superior Court for entry of judgments consistent with this opinion.[5]

We now summarize the salient facts, necessarily in some detail because of the scope of the legal issues. Our factual summary draws on the evidence presented to the jury and the judge's findings on the remainder, which we supplement with uncontroverted material of record.

1. *Factual background.* Astra is a pharmaceutical company incorporated in New York, with its principal place of business in Westborough. During the relevant times, it was one of many worldwide subsidiaries of Astra AB, which is a Swedish pharmaceutical manufacturing corporation publicly traded on

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[4] In *Harrison v. NetCentric Corp.*, 433 Mass. 465, 471, 744 N.E.2d 622 (2001), we reaffirmed the Commonwealth's "long-standing policy of applying the law of the State of incorporation to internal corporate affairs."

[5] We acknowledge the amicus brief submitted by the Globe Newspaper Company, Inc., in support of Astra.

the New York Stock Exchange. In 1981, Bildman, a Swedish national, became president and chief executive officer of Astra (then called Astra Pharmaceuticals), and served as a member of the boards of directors of Astra and Astra Germany. In 1993, he and Astra entered into an employment agreement, which was in effect from July 1, 1993, until his employment was terminated on June 25, 1996.[6]

In 1988, Hakan Mogren became the president and chief executive officer of Astra AB. Among other things, he established a strategic goal to increase Astra's presence in the United States pharmaceutical market. Bildman successfully implemented this strategy by, among other things, effecting what the judge termed "significant management changes" and creating a new "Rx Division," which targeted the so-called "general practitioner market," the sector of the pharmaceutical industry focused on outpatients and physicians' offices.[7] By 1995, the Rx Division employed a sales force of approximately 500. Although the Rx

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[6] From 1981 to July 1, 1993, Bildman's employment at Astra was governed by the terms of an "expatriate agreement" between himself and Astra AB, which provided for the payment of enumerated expenses related to employment abroad. The terms of the expatriate agreement, including salary and benefits, varied from time to time.

[7] The judge found that "[t]he prescription drug market in the United States has two primary sectors: the hospital sector and the . . . general practitioner market ('the GP market'). At relevant times, the hospital sector represented about 10 percent of the total American prescription drug market, with the remaining 90 percent in the GP market."

Division was not profitable during Bildman's tenure, Astra and Astra AB had expected that result. From 1991 to 1996, Astra's over-all profit met or exceeded the goals established for it by the parent company, and Bildman's salary and bonuses rose steadily.[8] In 1995, Mogren promoted Carl-Gustaf Johansson to the position of Astra AB Regional Director for North America. The newly created position gave Johansson direct supervisory authority over Astra and Bildman. Johansson and Bildman soon were in dispute over the strategic direction of Astra, the details of which we need not recite.

In December, 1995, Bildman learned that Business Week was investigating allegations of sexual harassment at Astra committed by him and other members of Astra's senior management. At the time, neither Astra's nor Astra AB's board of directors was aware of sexual harassment "problems" at Astra. There was in fact a problem, and it centered on Bildman. As early as 1985, Bildman had authorized and personally signed a "consulting agreement" for

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[8] The judge found that, "[i]n 1991, Astra paid Bildman a total of $928,751.60, including a bonus of $300,000. In 1992, it paid him $893,098.18, including a bonus of $300,000. In 1993, it paid him $955,348.56, including a bonus of $200,000. In 1994, it paid him $848,824.61, including a bonus of $180,000. In 1995, it paid him $1,028,583.75, including a bonus of $200,000. In 1996, it paid him $944,490.50, and awarded him a supplemental stock grant valued at $203,691 in March of that year." Itemized by type of compensation, these numbers have a combined value of $5,599,097 in salary, $1,180,000 in bonuses, and a stock grant valued at $203,691.

his former secretary, with compensation of $3,164 per month. The former secretary testified at trial that she left the company after she had been forced to have sexual relations with Bildman. In 1993, Bildman authorized a settlement payment of approximately $25,000 to another female employee who had filed a complaint with the Massachusetts Commission Against Discrimination alleging that he had sexually harassed her. In 1994, Bildman ordered Astra's general counsel to pay $50,000 to settle a sexual harassment claim against him by another female employee, as well as a payment of $95,000 to an employee who claimed that she had been fired in retaliation for reporting a complaint of sexual assault by another member of Astra's senior management. In early 1996, Bildman authorized a payment by Astra of $100,000 to settle sexual harassment claims against him by yet another former Astra employee (also female). Each of these settlement agreements was confidential and, among other things, prohibited the complainant from cooperating with the Equal Employment Opportunity Commission (EEOC) in any investigation of sexual harassment at Astra. At all relevant times, Astra had a written sexual harassment policy that forbade the acts alleged to have been committed by Bildman and other male executives with his knowledge or condonation.[9]

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[9] The numerous sexual harassment allegations by female employees against Bildman, in addition to a claim by his former secretary of coerced sexual relations, included, among others,

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In a December 19, 1995, telephone conference, Bildman; Charles Yon, Astra's corporate counsel; and Astra's outside employment counsel informed Johansson and other Astra AB officials of the Business Week investigation of allegations of sexual harassment at Astra. Bildman then assembled a task force, comprised of Yon and outside attorneys and consultants, to monitor and investigate the Business Week probe. The task force was not set up to investigate the merits of the sexual harassment claims but rather to determine Business Week's sources of information and to control the flow of information to Business Week and Astra AB. In a January 15, 1996, letter, Bildman informed Mogren that Business Week was investigating "alleged incidents of sexual harassment at Astra," that Astra was conducting an "extensive investigation" of the development, and that Astra was "positive there is no basis for such a story and believe[s] that it is very unlikely that an article will be written." The letter did not mention that Bildman himself was a target of the Business Week inquiry, although Bildman knew this was the case. Bildman subsequently forwarded to Mogren and Johansson a task force report prepared on or about January 16, 1996, a copy of which was entered in evidence, which concluded that Astra had a good record concerning

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sexually inappropriate comments, kissing or attempts to kiss, inappropriate touching of employees' necks and buttocks, and dancing with female employees in a sexually provocative manner.

sexual harassment, and that the Business Week investigation likely was instigated by an Astra competitor, a position Bildman continued to maintain throughout the early spring to Astra AB executives and to Astra's board of directors.[10]

At a meeting of Astra's board in March, 1996, Bildman, at the suggestion of Mogren and Johansson, made a presentation about the Business Week matter. With him was Yon and another Astra employee, who assured the board that Astra had "very good records" concerning sexual harassment claims and that its statistics on sexual harassment over the previous eight to ten years compared favorably with those of comparably sized companies. At one point during the board meeting Mogren asked all three employees whether Astra had anything "to be ashamed of" in relation to sexual harassment charges. Yon answered that it did not. At a meeting in Stresa, Italy, in mid-April, Bildman again assured Astra AB

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[10] The jury heard testimony that Bildman told Johansson and other witnesses that he suspected that the competitor urging the Business Week investigation was Astra-Merck, Inc., a joint venture between Astra AB and Merck, Inc., licensed to sell Astra products in the United States. The jury also heard testimony that, as of spring, 1996, Bildman and Johansson disagreed sharply about whether certain products should be sold by Astra or Astra-Merck. In a vain attempt to support his suspicions that Mogren and Johansson were not acting in the best interests of Astra, and in response to the Business Week probe, Bildman surreptitiously tape recorded telephone conferences with Johansson and Mogren from Rhode Island, a one-party consent State.

officials of Astra's allegedly good record on sexual harassment, even though he also stated that he feared that Business Week was about to publish an article about widespread sexual harassment at Astra.[11]

From that point, events unfolded quickly. On April 16, Mark Maremont of Business Week wrote a two-page letter asking to speak with Bildman and Astra AB about "serious allegations of sexual harassment" at Astra, including allegations concerning Bildman. That same day, Maremont also sent a letter to Mogren in Sweden that enclosed his letter to Bildman and offered an opportunity for Astra AB to respond to the allegations. The next day, April 17, Yon sent a letter to Maremont denying the allegations and offering to meet with Maremont if Maremont provided more details about the charges. Maremont responded on April 18 with a seven-page letter to Yon offering additional substantiation, and on April 19 Yon forwarded a copy of the letter to Mogren, Johansson, and other Astra AB officials.[12] On receiving the letter, Johansson; Astra AB general counsel, Goran Lerenius; and Thomas Clauss, Jr., a partner in the law firm of Winthrop, Stimson, Putnam &

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[11] From December, 1995, through March, 1996, Bildman apparently also orchestrated a campaign to direct female and minority Astra employees to write letters of support for him to Astra AB.

[12] The letter, although heavily redacted, was admitted in evidence.

Roberts (Winthrop Stimson), went to Astra's headquarters in Westborough to conduct their own investigation. On April 22 and April 23, they interviewed Astra employees, including Bildman, about the Business Week allegations. As a result of its investigation, on April 28, 1996, the board of directors of Astra voted unanimously to suspend Bildman with pay, to appoint an interim president-chief executive officer of Astra, to create a special committee chaired by Johansson to investigate "allegations of sexual harassment and other improprieties or failures to abide by policies and procedures" of Astra, and to report its findings to the full board. The special committee subsequently retained Winthrop Stimson to conduct the investigation.

Johansson informed Bildman by letter of the board's decisions and asked Bildman that he both cooperate fully in the investigation and refrain from contacting any current or former Astra employees about it. Bildman did neither. He refused repeated requests from the Winthrop Stimson investigators to be interviewed. In addition, he and Lars Magnusson, a consultant at Astra whom Bildman had hired in January, 1996, contacted former and current Astra employees, asking them to deny that Bildman ever acted improperly toward female employees, and threatened others with termination or adverse publicity if they cooperated with Winthrop Stimson. The jury also heard evidence that, at Bildman's direction and without the knowledge of Astra's board, Magnusson set up a five-employee satellite office from

which he shredded corporate documents; that he and Bildman removed Astra documents, including financial documents, from Bildman's office; and that after receiving a telephone call from Bildman, Magnusson had company computers "erased."

In addition to uncovering evidence of pervasive sexual harassment of female Astra employees by Bildman and others in senior management, and evidence of the threats to employees and destruction of company documents mentioned above, the Winthrop Stimson investigation found, and the jury heard evidence of, serious financial and other improprieties.[13]

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[13] The evidence includes the following:

Bildman employed Astra vendors, including contractors, landscapers, and craftsmen, to do extensive work on the interior and exterior of his residences in Massachusetts and his vacation home in Vermont, and surreptitiously had the work billed to and paid by Astra, in an amount estimated at two million dollars for contractor services and $110,000 for landscaping and design services.

Bildman chartered yachts for two- or three-day personal sailing trips at Astra's expense without identifying the specific nature of the charges.

Bildman hired "[y]oung and attractive" female "escorts" for himself and others, and billed the expenses to Astra without identifying the specific nature of the charges.

Bildman used Astra employees to provide personal services for him on company time, including work

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In early May, 1996, Maremont's article appeared as the cover story in Business Week, under the title "Abuse of power: The astonishing tale of sexual harassment at Astra USA." Business Week reported that it had interviewed "more than 70 former and current employees" and found "a disturbing pattern of complaints during much of Bildman's 15-year tenure," including "a dozen cases of women who claimed they were either fondled or solicited for sexual favors by Bildman or other [Astra] executives." Not surprisingly, the Business Week article drew national and international attention. Reports about sexual harassment at Astra and by Bildman appeared in the Boston Globe, the Providence Journal-Bulletin, the Wall Street Journal, and in over 150 articles in various publications worldwide.

On June 25, 1996, Astra's board of directors voted to rescind the employment agreement and terminate Bildman's employment for cause,[14] and he was so

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relating to maintaining his antique automobile collection and providing private tennis lessons to his family.

Bildman directed Astra to pay $16,000 in legal costs he incurred contesting a speeding ticket fining him sixty-six dollars.

During the course of the investigation, Bildman contacted Astra vendors with requests that they alter their business records to reflect that he personally had paid for items actually paid for by Astra.

[14] At trial, Bildman testified that the employment agreement "does, of course, not permit me to engage in wrongful behavior against the company. No, it does not."

notified by letter. In February, 1998, the EEOC filed a complaint against Astra alleging a pattern and practice of sexual harassment of Astra female employees since "at least January 1, 1993 and continuing." The complaint resulted in a consent decree in which Astra, although not admitting liability, established a $9,850,000 fund to compensate victims of sexual harassment at the company.[15]

2. *Procedural background.* On February 4, 1998, Astra filed suit in the Superior Court against Bildman for fraud, breach of fiduciary duty and the duties of good faith and loyalty, waste of corporate assets, rescission of the 1993 employment agreement, and conversion. It sought a declaratory judgment that it had properly rescinded the employment agreement, and damages on the remaining counts. Bildman counterclaimed against Astra and third-party defendant Astra AB for, as amended, breach of contract, violation of G.L. c. 149, § 148 (fair wage practices act), and indemnification of attorney's costs and expenses for the civil action and for "successfully defending" the criminal action. Bildman also filed an action against Astra, Mogren, and Johansson for malicious libel, negligent libel, and libel per se. The two actions

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[15] In March, 1997, Bildman was indicted by a Federal grand jury for wire and mail fraud, filing false tax returns, and conspiracy for receiving various goods and services from Astra that he failed to report as income. In January, 1998, he pleaded guilty to three counts of wilfully filing false Federal tax returns. By plea agreement, the remaining counts were dismissed, including counts charging Bildman with defrauding Astra.

were consolidated, and were specifically assigned to one judge in the Superior Court. Of relevance to this appeal are the following proceedings in the consolidated cases.

In December, 2000, the judge granted Bildman summary judgment on Astra's claim for a judgment declaring that it properly rescinded the employment agreement. In October, 2001, the judge granted Astra's summary judgment motion on all of Bildman's libel claims on the ground that Bildman was a "limited public figure" and could not maintain a claim for negligent libel, citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974). The judge also denied Bildman's motion for attorney's fees, concluding that the issue turned on whether Astra had terminated Bildman's employment for cause, a matter to be determined by a jury. The parties' remaining claims were tried before a jury.

The trial commenced in January, 2002, and took more than seven weeks. On February 21, 2002, the jury found Bildman liable to Astra for fraud, conversion, waste, and breach of fiduciary duty by, in the words of the verdict form, "making affirmative misrepresentation or failing to disclose to Astra material information which he had a duty to disclose," and for "improper use of Astra funds." As noted, the jury awarded Astra damages in the aggregate amount of $1,040,812. Further, the jury found that Bildman engaged in sexual harassment of Astra employees and that he retaliated against Astra employees who had exercised their rights to make complaints under

Astra's sexual harassment policy. (The verdict form did not provide for additional damages for these acts.)

As to Bildman's claims, the jury found that Astra did not breach the employment agreement in terminating Bildman or with regard to Astra's profit sharing plan. The jury also found against Bildman on his claims that Mogren and Johansson intentionally interfered with his employment contract with Astra. Finally, the jury found that Bildman did not fraudulently induce Astra to enter into a March, 1996, supplemental stock grant, and awarded him $203,691 under the agreement.[16]

Both parties filed postjudgment motions for relief. Astra renewed its request for rescission of the employment agreement, and requested rescission of the 1996 stock agreement, forfeiture of all of Bildman's compensation from 1991 to 1996,[17] setoff, and punitive damages. On May 5, 2005, the judge issued a memorandum of decision and order permitting setoff of Bildman's $203,691 jury award against Astra's damages, refused to revisit her pretrial rulings on rescission, held that Astra was entitled to an evidentiary hearing on the issue of forfeiture limited to the issue whether Bildman's compensation exceeded

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[16] The judge subsequently offset Bildman's damages award against Astra's. *See infra*.

[17] The issue of forfeiture did not go to the jury, the judge having determined to reserve the matter for postverdict consideration.

the value of his services for the period 1991-1996, and declined Astra's further requests for postjudgment relief. The judge held an evidentiary hearing on the forfeiture claim and ruled that Astra was not entitled to recover any amount by way of forfeiture because the value of Bildman's services was commensurate with his value to the company through 1996. Bildman renewed his motion for indemnification and for attorney's fees, which the judge denied on May 5, 2005.

We now proceed to consider the five issues on appeal.

3. *Rescission.* Astra claims that it properly rescinded the 1993 employment agreement because during contract negotiations Bildman failed to disclose material information about his own breaches of fiduciary duty, which (Astra claims) he had an affirmative duty to do as a company officer and director. The judge granted Bildman's summary judgment motion on Astra's rescission claim. The judge reasoned, in essence, that Astra had failed to establish that Bildman affirmatively misrepresented any material fact during the negotiations of the employment agreement, and that it would be inequitable to permit rescission three years after the inception of the employment agreement where Astra never inquired about the conduct in question. She declined to revisit her ruling after the verdict when Astra again sought rescission of the employment agreement and the supplemental stock grant based on the jury's findings.

On appeal Astra maintains that Bildman, as president and chief executive officer of Astra, had fiduciary obligations to Astra that required him to disclose his disloyal acts in the course of negotiating his 1993 employment agreement with Astra, and that his silence concerning them was an affirmative misrepresentation. *See, e.g., Geller v. Allied-Lyons PLC,* 42 Mass.App.Ct. 120, 125-126, 127, 674 N.E.2d 1334 (1997) (agreement void and unenforceable where corporate fiduciary gave, at best, only "sotto voce indications" of his self-interested dealings to his principal; "full and fair disclosure" of self-dealing was required). Bildman counters that, while he was negotiating the employment agreement with Astra, he was a "private individual" engaged in an arm's-length transaction, whose fiduciary obligations to the company were effectively held in abeyance.[18]

The employment agreement states that it shall be construed and enforced "in accordance with the laws of the Commonwealth of Massachusetts," and neither party contends otherwise. Under our law, rescission is an equitable remedy, within the judge's sound discretion. *See Coggins v. New England Patriots*

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[18] The jury heard conflicting evidence about whether Bildman's negotiations with Astra over the terms of the 1993 employment agreement were at arm's length. Bildman testified that Attorney Neal Tully was both Bildman's private attorney and the secretary of Astra's board of directors. Tully, according to Bildman, provided Bildman with "advice" on the employment agreement and acted as a "liaison" for the parties during contract negotiations.

Football Club, Inc., 397 Mass. 525, 536, 492 N.E.2d 1112 (1986); *Augustine v. Rogers*, 47 Mass.App.Ct. 901, 902, 710 N.E.2d 1030 (1999) ("rescission is an equitable remedy awarded at the discretion of the court"). Both because we discern no abuse of discretion in the judge's rulings on rescission and because our conclusions below on the issue of forfeiture make the remedy of rescission duplicative, at least with respect to Bildman's salary and bonuses,[19] we will not disturb the judge's grant of summary judgment to Bildman on Astra's rescission claim.

4. *Forfeiture.* (a) *Introduction.* As noted earlier, the judge reserved the issue of forfeiture for judicial determination, if necessary, following the jury's verdict. *Cf. Ulico Cas. Co. v. Wilson, Elser, Moskowitz, Edelman & Dicker*, 56 A.D.3d 1, 13, 865 N.Y.S.2d 14 (2008) (issue of forfeiture of attorney's compensation during period of alleged disloyalty is factual issue to be decided posttrial on full record, if necessary). After the jury found Bildman liable to Astra for breach of fiduciary duty, Astra moved for postjudgment equitable relief on its forfeiture claim. The judge correctly determined that New York law governed that claim. *Harrison v. NetCentric Corp.*, 433 Mass. 465, 470-471, 744 N.E.2d 622 (2001). *See* note 4, *supra*. She ordered an evidentiary hearing on forfeiture limited to the question whether Bildman's compensation during the

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[19] Astra does not specify the nature or amount of its damages under the remedy of rescission.

period of his disloyalty, 1991 through 1996, exceeded the value of his services. Based on her determination that Astra failed to prove that Bildman's compensation exceeded the value of his benefit to Astra, and that forfeiture of all of Bildman's compensation would impose a "disproportionately harsh" penalty on Bildman, the judge declined to exercise her discretion to order repayment of his salary and bonuses.

Astra continues to maintain that, under New York's strict application of the forfeiture doctrine, Bildman must forfeit all of his salary and bonuses from 1991 through 1996, an amount in excess of $5 million.[20] It argues that the judge erred as a matter of law and abused her equitable powers by limiting the remedy of forfeiture under New York law to Bildman's compensation in excess of the value of Bildman's services during the period of disloyalty, 1991 through 1996.

We review the judge's forfeiture order de novo, taking into consideration New York's forfeiture law. *See Phansalkar v. Andersen Weinroth & Co.*, 344 F.3d 184, 199 (2d Cir.2003) (reviewing de novo trial court's

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[20] Astra does not argue for forfeiture of any form of compensation other than Bildman's "salary" and "bonuses." On appeal Astra seeks forfeiture of Bildman's combined salary and bonuses from 1991 through 1996, "a total of $5,599,097 in salary and another $1,180,000 in bonuses." Astra's totals do *not* include the $203,691 value of the 1996 supplemental stock grant, an amount also listed in the judge's findings. Astra therefore has waived any claim for forfeiture of the stock grant.

application of New York forfeiture law). The judge appropriately and commendably sought to exercise her equitable powers fairly within what she perceived to be the latitude afforded her by New York law. We reverse because we conclude that, in the circumstances of this case, application of New York's "faithless servant" doctrine requires that Bildman forfeit all of his salary and bonuses from Astra for the period of disloyalty and that the judge was without authority to rule otherwise.[21]

We begin with a brief overview of New York forfeiture law.

(b) *Equitable forfeiture under New York law.* The remedy of equitable forfeiture in New York is grounded on that State's law of agency, in particular on its "faithless servant" doctrine. *See generally* R.L. Haig, Commercial Litigation in New York State Courts § 75.51 (2d ed. 2005). Under that doctrine, "[a]n agent is held to uberrima fides [utmost fidelity] in his dealings with his principal, and if he acts adversely to his employer in any part of the transaction, or omits to disclose any interest which would naturally influence his conduct in dealing with the

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[21] Although Astra's complaint alleges breaches of fiduciary duty dating back "from the 1980s," and the judge at one point in her postjudgment memorandum of decision concerning forfeiture states that Astra sought forfeiture of Bildman's compensation from 1990 to 1996, both the judge's posttrial decision on forfeiture and, apparently, Astra's appeal focus on the period 1991 through 1996, which we hold to be the forfeiture period.

subject of the employment, it amounts to such a fraud upon the principal, as to forfeit *any* right to compensation for services" (emphasis added). *Murray v. Beard,* 102 N.Y. 505, 508, 7 N.E. 553 (1886). *See Lamdin v. Broadway Surface Advertising Corp.,* 272 N.Y. 133, 138, 5 N.E.2d 66 (1936) (employee or agent "forfeits his right to compensation for services rendered by him if he proves disloyal"). *See also Royal Carbo Corp. v. Flameguard, Inc.,* 229 A.D.2d 430, 430, 645 N.Y.S.2d 18 (N.Y.1996) ("well settled that one who owes a duty of fidelity to a principal and who is faithless in the performance of his or her services is generally not entitled to recover compensation, whether commissions or salary"); *Soam Corp. v. Trane Co.,* 202 A.D.2d 162, 163, 608 N.Y.S.2d 177 (1994) ("agent is held to the utmost good faith in his dealings with his principal, and forfeits any right to compensation for his services if he acts adversely to his employer"); *Bon Temps Agency Ltd. v. Greenfield,* 184 A.D.2d 280, 281, 584 N.Y.S.2d 824 (1992) ("disloyal employee is not entitled to receive compensation, whether commissions or salary").

The law of New York requires the disloyal employee to forfeit his compensation even if he otherwise performed valuable services for the principal. As the Court of Appeals of New York stated in its oftencited modern case on forfeiture: "One who owes a duty of fidelity to a principal and who is faithless in the performance of his services is generally disentitled to recover his compensation, whether commissions or salary. . . . Nor does it make any

difference that the services were beneficial to the principal, or that the principal suffered no provable damage as a result of the breach of fidelity by the agent." *Feiger v. Iral Jewelry, Ltd.*, 41 N.Y.2d 928, 928-929, 394 N.Y.S.2d 626, 363 N.E.2d 350 (1977). This principle was recently reaffirmed in *William Floyd Union Free Sch. Dist. v. Wright*, 61 A.D.3d 856, 877 N.Y.S.2d 395 (2009), in which the Appellate Division of the New York Supreme Court reversed a trial court decision limiting forfeiture of retired disloyal employees' retirement insurance benefits to ten years. The court held that where "defendants engaged in repeated acts of disloyalty, complete and permanent forfeiture of compensation, deferred or otherwise, is warranted under the faithless servant doctrine." *Id.* at 859, 877 N.Y.S.2d 395.[22]

The rule enunciated in *Murray v. Beard, supra; Feiger v. Iral Jewelry, Ltd., supra;* and the other cases cited above might seem to imply that disloyal employees and agents must forfeit all compensation ever received from the employer. *See Phansalkar v. Andersen Weinroth & Co., supra* at 204 (noting traditional rule). New York's intermediate courts, however, have, although not always uniformly or

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[22] For equitable forfeiture to apply under New York law, the disloyal employee's breach of fiduciary duty need not rise to the level of fraud. *See Phansalkar v. Andersen Weinroth & Co.*, 344 F.3d 184, 204 (2d Cir.2003) (finding "nothing in New York law to suggest that a specific intent to defraud is necessary to render misconduct sufficient to warrant forfeiture").

consistently, carved out limitations to absolute forfeiture. For example, Appellate Division decisions generally have limited the period of forfeiture to the period of the employee's disloyalty. *See, e.g., Soam Corp. v. Trane Co., supra* at 163, 608 N.Y.S.2d 177 (defrauded principal not liable to disloyal agent for commission fees earned during period of disloyalty); *Maritime Fish Prods., Inc. v. World-Wide Fish Prods., Inc.,* 100 A.D.2d 81, 91, 474 N.Y.S.2d 281 (1984) (employee who worked for company for approximately seven years must forfeit compensation received during fourteen-month period of disloyalty). Others have required the disloyalty to be substantial and pervasive for forfeiture to apply. *See, e.g., Matter of Blumenthal,* 32 A.D.3d 767, 768, 822 N.Y.S.2d 27 (2006) ("In light of respondent's repeated disloyalty throughout his tenure, there is no merit to his assertion that there should have been an apportionment of his salary or . . . commissions as to which disloyalty was not found"). *See also Phansalkar v. Andersen, Weinroth & Co., supra* at 202 n. 13. These limitations are narrow, however, and do not destroy the vitality of the faithless servant doctrine under New York law.[23] *See, e.g., William Floyd Union Free Sch. Dist. v. Wright,* 61 A.D.3d 856, 859, 877 N.Y.S.2d 395 (2009) (where "defendants engaged in

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[23] *See, e.g., Schwartz v. Leonard,* 138 A.D.2d 692, 694, 526 N.Y.S.2d 506 (1988) (single act of disloyalty-a lawyer removing files that he had been working on from defendant's office and then starting a law practice of his own – not "persistent pattern of disloyalty" and thus did not warrant any forfeiture).

repeated acts of disloyalty, complete and permanent forfeiture of compensation, deferred or otherwise, is warranted under the faithless servant doctrine").[24]

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[24] As the parties and the judge acknowledged, Federal courts purporting to apply New York's strict law on forfeiture have expressed some unease about the doctrine's sometimes harsh consequences, and in general have engaged in a more contextual approach to the agent's disloyalty. *See, e.g., Design Strategy, Inc. v. Davis,* 469 F.3d 284 (2d Cir.2006) (disloyal employee who earned both base salary and sales commissions forfeits all salary paid during period of disloyalty but not his commissions earned, because employee's disloyalty did not arise in connection with any commissions to which he was entitled under terms of his employment agreement); *Phansalkar v. Andersen, Weinroth & Co.,* 344 F.3d 184, 205 (2d Cir.2003) (expressing concern that earlier Federal forfeiture holdings were in "tenuous posture" in relation to New York law). *See also G.K. Alan Assoc., Inc. v. Lazzari,* 44 A.D.3d 95, 103, 840 N.Y.S.2d 378 (2007), aff'd, 10 N.Y.3d 941, 862 N.Y.S.2d 855, 893 N.E.2d 133 (2008) (noting that Federal courts attempting to predict how Court of Appeals of New York would apply forfeiture have held that faithless servants forfeit only compensation related to transaction in which disloyalty occurs, provided, inter alia, that parties agreed to task-by-task compensation regime), quoting *Phansalkar v. Andersen, Weinroth & Co., supra.* Nonetheless, the rulings of the United States Court of Appeals for the Second Circuit on New York forfeiture law adhere to the principle of strict forfeiture of all compensation for the period of disloyalty or the task disloyally performed. Thus, for example, in the *Phansalkar* case, *supra* at 187, the disloyal employee was required to forfeit all compensation earned after the first act of disloyalty, including $4.4 million in stock awarded for services faithfully rendered. In *Sequa Corp. v. GBJ Corp.,* 156 F.3d 136, 146-147 (2d Cir.1998), the disloyal employee was ordered to forfeit $900,000 in compensation for disloyal acts that cost the company approximately $26,000.

(c) *Application of equitable forfeiture.* While acknowledging in her posttrial memorandum that New York law governed forfeiture, and that a faithless servant is "generally disentitled to recover his compensation" under New York law, the judge offered three reasons why she was "not persuaded" that Astra was entitled to the "extreme" remedy of forfeiture of all compensation from the commencement of the period of disloyalty. We conclude that the rationales are not supported in New York forfeiture law.

First, the judge stated that New York forfeiture law requires only that compensation allegedly *due* to the disloyal employee must be forfeited, and not that compensation already paid must be disgorged. We conclude that applicable New York precedent is to the contrary. *See, e.g., Luskin v. Seoane,* 226 A.D.2d 1144, 1145, 641 N.Y.S.2d 478 (1996) (disgorgement of "all compensation and expenses that plaintiff paid" to disloyal employee during period of disloyalty); *Maritime Fish Prods., Inc. v. World-Wide Fish Prods., Inc.,* 100 A.D.2d 81, 91, 474 N.Y.S.2d 281 (1984) (company "entitled to the *return* of any compensation paid [its employee] during the period of disloyalty"). *See also Aramony v. United Way Replacement Benefit Plan,* 191 F.3d 140, 153-154 & n. 6 (2d Cir.1999) (affirming judge's order for disgorgement of all salary during period of disloyalty, limited to seven-year statute of

limitations period).[25] In a more recent definitive statement, the Appellate Division found "no merit to [the disloyal employee's] argument that disgorgement of compensation received by a faithless employee should be disallowed as tantamount to the imposition of punitive damages." *Matter of Blumenthal,* 32 A.D.3d 767, 768, 822 N.Y.S.2d 27 (2006). In sum, New York law entitles Astra to sums already paid in compensation to Bildman during the period of his disloyalty.

Second, the judge sought to distinguish Astra's claim for forfeiture on the ground that New York "generally" applies forfeiture only to what she termed "low-level" employees who had diverted corporate opportunities. Again, this is a distinction not supported by New York law. The defendant in *Aramony v. United Way Replacement Benefit Plan, supra* at 143, 145, was the former president and chief executive officer of a major national charitable corporation who, among other things, improperly used the charity's funds and filed false expense accounts in order to sustain his extravagant lifestyle. The employee in *Matter of Blumenthal, supra,* was a former executor who diverted monies from the estate to "himself and his wife and entities with which his wife was affiliated," falsely claiming that they were incentive payments. *See also Maritime Fish Prods., Inc. v.*

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[25] To the extent that the statute of limitations may be implicated in a claim of forfeiture, the judge held, and we agree, that Bildman failed to assert this defense and it is waived.

World-Wide Fish Prods., Inc., supra (company vice-president diverted corporate opportunities and set up rival business while in company's employ); *Harry R. Defler Corp. v. Kleeman,* 19 A.D.2d 396, 399-401, 243 N.Y.S.2d 930 (1963), aff'd, 19 N.Y.2d 694, 278 N.Y.S.2d 883, 225 N.E.2d 569 (1967) (general manager vice-president misused company's confidential information to set up competing company). Like Bildman, *see* note 13, *supra,* these defendants were senior executives who used their position for substantial improper personal gain; they were required to forfeit their compensation as a consequence.

Third, and perhaps most significantly, the judge opined that "[r]ules of reason and fairness and the lack of New York Court of Appeals decisions mandating forfeiture in all cases of breach of fiduciary duty suggest that this Court should follow a less strict approach in determining how to impose forfeiture." In other words, the judge reasoned that forfeiture of the entirety of Bildman's compensation for the period of disloyalty was unfair in light of Bildman's substantial services to Astra.[26] Accordingly, the judge looked to Massachusetts equitable principles to fashion the requirement that Astra was entitled to forfeiture of only the amount of compensation determined after an evidentiary hearing to be

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[26] Astra does not challenge the judge's posttrial findings on Bildman's substantial contributions to Astra.

in excess of the value of Bildman's services to the company.

Reliance on Massachusetts equity law was misplaced.[27] Massachusetts permits a task-by-task apportionment of forfeiture; New York, the State whose law controls here, does not. Compare *Chelsea Indus., Inc. v. Gaffney,* 389 Mass. 1, 14, 449 N.E.2d 320 (1983), with *Maritime Fish Prods., Inc. v. World-Wide Fish Prods., Inc.,* 100 A.D.2d 81, 91, 474 N.Y.S.2d 281 (1984) (company "entitled to the return of *any* compensation paid [its employee] during the period of disloyalty" [emphasis added]). Under Massachusetts law, the value of the disloyal employee's faithful services is determinative; under New York law, it is irrelevant. Compare *Meehan v.*

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[27] Astra makes no claim of breach of fiduciary duty under the employment agreement, which is governed by Massachusetts law. Its claim for forfeiture is explicitly (and exclusively) based on loyalty principles. In its complaint, Astra requested that the Superior Court, "[p]ursuant to Count II (Breach of Fiduciary Duty), enter judgment for the plaintiff in the full amount determined through the accounting, as well as such other amounts attributable to [Bildman's] breaches of his obligations to the plaintiff." The jury, moreover, found that Bildman had violated his fiduciary duty, not his fiduciary duty under the employment agreement. Finally, it is established that the specific remedy of forfeiture of compensation is a consequence of application of the "faithless servant" doctrine, which is rooted in fiduciary principles. *See* Annot., Application of "Faithless Servant Doctrine," 24 A.L.R.6th 399, 399 (2007) ("The faithless servant doctrine provides that an employee who violates his or her duty or loyalty of fidelity in the performance of his or her employment duties forfeits the right to compensation therefor").

Shaughnessy, 404 Mass. 419, 440, 535 N.E.2d 1255 (1989), with *Feiger v. Iral Jewelry, Ltd.,* 41 N.Y.2d 928, 928-929, 394 N.Y.S.2d 626, 363 N.E.2d 350 (1977) (makes no difference "that the services were beneficial to the principal, or that the principal suffered no provable damage as a result of the breach of fidelity by the agent").[28]

In short, invocation of Massachusetts doctrines of equitable forfeiture to remediate what the judge considered a result contrary to "reason and fairness" was not appropriate where settled precedent of New York law requires forfeiture in the circumstances of this case. Bildman argues that the judge's actions were permissible because, although New York law

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[28] The judge's rationale for refashioning the forfeiture requirements of New York law relied on *Meehan v. Shaughnessy,* 404 Mass. 419, 440, 535 N.E.2d 1255 (1989); *Chelsea Indus., Inc. v. Gaffney,* 389 Mass. 1, 14, 449 N.E.2d 320 (1983), and similar decisions applying Massachusetts law. *See In re Tri-Star Techs. Co.,* 257 B.R. 629, 637 (Bankr.D.Mass.2001) (applying Massachusetts law because "the forfeiture remedy is not a penalty but really reimbursement of payment for services not properly performed . . . compensation is often apportioned in relation to services indeed properly performed"); *Anderson Corp. v. Blanch,* 340 Mass. 43, 51, 162 N.E.2d 825 (1959); *Production Mach. Co. v. Howe,* 327 Mass. 372, 378-379, 99 N.E.2d 32 (1951); and *Lydia E. Pinkham Med. Co. v. Gove,* 303 Mass. 1, 6, 20 N.E.2d 482 (1939). It is evident, however, that Massachusetts forfeiture law is more lenient on the issue of retainable compensation than New York law. *See* generally Sheridan, Second Circuit Draws Bright Line on Forfeiture of Pay for Disloyalty, N.Y.L.J. Feb. 23, 2004, at 9, col. 1 (contrasting New York's "bright line" rule of forfeiture with more relaxed Massachusetts forfeiture standards).

governs the issue whether an employee breached his fiduciary duties, Massachusetts remedies may apply if the case is heard in the Commonwealth. To the contrary, to separate the breach and the remedy in this fashion would interfere with New York State's legitimate interest in regulating the affairs of its corporations. *See Harrison v. NetCentric Corp.*, 433 Mass. 465, 470-471, 744 N.E.2d 622 (2001), quoting *Atherton v. Federal Deposit Ins. Corp.*, 519 U.S. 213, 224, 117 S.Ct. 666, 136 L.Ed.2d 656 (1997) ("To avoid the imposition of 'conflicting demands,' 'only one State should have the authority to regulate a corporation's internal affairs – matters peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders'"). Such regulation extends to imposing the specific penalties the State deems most likely to deter the corporate misconduct it seeks to discourage. The rule urged by Bildman would permit identical employee breaches of disloyalty to New York corporations to be treated differently based on accidents of geography, an unacceptable result.[29] *See Harrison v. NetCentric Corp., supra.*

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[29] Bildman also asserts on appeal that the judge had authority under New York principles of equity to reshape the remedy of forfeiture as she did. *See* N.Y. Civ. Prac. L. & R. §§ 3017, 3215 (McKinney Supp.2009) ("the court may grant any type of relief within its jurisdiction appropriate to the proof whether or not demanded, imposing such terms as may be just"). However, Bildman has cited no decision in which a New York appellate court has invoked this equitable authority to relax the

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Once it was determined that from 1991 to his termination on June 25, 1996, Bildman, a senior employee, officer, and director, had committed numerous and substantial breaches of his fiduciary duties to Astra, forfeiture is warranted of all of Bildman's compensation for the period of disloyalty, to the extent sought by Astra. *See* note 20, *supra*; *William Floyd Union Free Sch. Dist. v. Wright,* 61 A.D.3d 856, 859, 877 N.Y.S.2d 395 (2009).[30]

New York forfeiture standard that has developed well over one century. *Design Strategy, Inc. v. Davis,* 469 F.3d 284, 300 (2d Cir.2006). Cf. *Shomron v. Fuks,* 286 A.D.2d 587, 730 N.Y.S.2d 90 (2001) (petition to disqualify opposing party's law firm and to order American Arbitration Association to reinstate original arbitrator); *Ungewitter v. Toch,* 31 A.D.2d 583, 294 N.Y.S.2d 1013 (1968), aff'd, 26 N.Y.2d 687, 308 N.Y.S.2d 858, 257 N.E.2d 40 (1970) (damage award in lieu of rescission for fraudulent purchase of farm).

[30] Our conclusions on the issue of forfeiture make it unnecessary to consider at length the judge's findings, after the evidentiary hearing on forfeiture, that Bildman's breaches of duty, although serious, were ancillary to the significant contributions he made to Astra's business. The evidence heard by the jury was overwhelming that from 1991 through 1996, Bildman used Astra as his personal checkbook and his sexual fiefdom, in the process driving away employees, creating a corrosive corporate atmosphere, causing Astra actual loss, and leading to months of bad publicity about the company. We agree with Astra that, as a matter of law, even under the more lenient substantial and pervasive standards of forfeiture, *see* text accompanying note 23, *supra*, Bildman's breaches of fiduciary duty mandate equitable forfeiture of his compensation during the period of his disloyalty.

New York's forfeiture law has been described as harsh, as the judge determined it to be. Cf. *Soam Corp. v. Trane Co.*, 202 A.D.2d 162, 163, 608 N.Y.S.2d 177 (1994) (plaintiff argued that forfeiture is "unconscionable penalty," but court concluded that this contention was negated by "New York's strict application of the forfeiture doctrine"). For New York, however, the harshness of the remedy is precisely the point. *See, e.g., Matter of Blumenthal,* 32 A.D.3d 767, 768, 822 N.Y.S.2d 27 (2006) ("no merit" to respondent's argument that "disgorgement of compensation received by a faithless employee should be disallowed as tantamount to the imposition of punitive damages," and declining invitation to abolish faithless servant doctrine, "which has long been the law of this State").

5. *Costs of investigation.* The judge refused to permit Astra to argue to the jury that Bildman was liable to the company for the entire $905,080 cost of Winthrop Stimson's investigation of the sexual harassment claims. She then denied Astra's motion for postverdict damages for investigative costs in the same amount. She declined to make the award because, among other things, she viewed it as "excessive" in the circumstances. Astra maintains on appeal that it is entitled to the full $905,080 as the compensatory damage it suffered as a result of Bildman's

misconduct, an issue, it argues, that should have gone to the jury.[31]

The judge did not abuse her discretion in keeping this issue from the jury. The judge noted that the matter of damages for investigative costs "has never squarely been an issue in this case." She reasoned that, given the number of witnesses that would be required to explore the propriety of each item of services rendered by Winthrop Stimson in its sixty-nine page bill, and its costs, the issue would be too confusing and time-consuming for the jury, which had already been sitting for seven weeks.[32] *See Commonwealth v. Durning*, 406 Mass. 485, 497, 548 N.E.2d 1242 (1990) (within judge's discretion to exclude evidence that, while relevant, presents danger of "confusion, unfair prejudice, or undue consumption of time" that outweighs probative worth of evidence offered).

We are also unpersuaded that Astra has met its burden of proving to the judge its entitlement to

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[31] On appeal, Bildman counters that the investigative costs are "expressly barred" by the employment agreement, which provides in relevant part: "In no event shall the Employee be required to reimburse the Company for any legal fees or expenses incurred by it in connection with this Agreement." We agree with Astra that this theory was not presented before the trial court and is waived. *See, e.g., Matter of Balliro*, 453 Mass. 75, 85 n. 9, 899 N.E.2d 794 (2009) (waiver).

[32] On appeal, Astra does not argue before us that it properly framed this issue for the jury.

$905,080 in investigation costs.[33] *See Hawthorne's, Inc. v. Warrenton Realty, Inc.*, 414 Mass. 200, 210 n. 7, 606 N.E.2d 908 (1993). Astra correctly asserts that an employer may be entitled to recover for compensatory costs incurred as a result of a breach of fiduciary duty, including the costs of investigation. *See Aramony v. United Way Replacement Benefit Plan*, 191 F.3d 140, 154 (2d Cir.1999). But the award of damages for investigative costs itself is not an entitlement; the employer must still meet its settled burden of proving that the damages sought were caused by the employee.[34] *See Chelsea Indus., Inc. v. Gaffney*, 389 Mass. 1, 18, 449 N.E.2d 320 (1983) (affirming damage award of specific costs where master found such costs to be "direct consequence of the breaches of fiduciary duty by the defendants"). Here the jury found that Bildman's affirmative and material misrepresentations and improper use of Astra funds was "a substantial factor in causing harm

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[33] The parties do not argue whether this issue is decided under Massachusetts or New York law. The case law of both jurisdictions demands the same result. *See Chelsea Indus., Inc. v. Gaffney*, 389 Mass. 1, 18, 449 N.E.2d 320 (1983) (defendants' arguments failed because they ignored causation found by master); *Aramony v. United Way Replacement Benefit Plan*, 191 F.3d 140, 154 (2d Cir.1999) (failure to prove causation is fatal to claim for costs of investigation).

[34] To the extent that Astra argues that it was entitled to recoup the investigative costs merely because it was "legally *required* to conduct a prompt and thorough investigation," this assertion again is no substitute for the requirement of proving causation.

to Astra." However, merely pointing to these findings, as Astra does, does not satisfy the causation requirement for damages related to investigative costs.

Nor does the record permit a finding of the necessary causation. At trial, Bildman established decisively, as the judge subsequently noted, that many of the investigative costs that Astra alleged resulted from Bildman's acts had no direct relationship to Bildman, other than the fact that his own wrongdoing spurred revelations of the wrongdoings of others.[35] Even accepting Astra's argument that Bildman's conduct was a "substantial factor" in its choice to conduct a detailed investigation of circumstances at the company, it is established that the "substantial factor" standard is insufficient to satisfy

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[35] The record establishes, for example, that some of the items enumerated in Winthrop Stimson's bill of its investigation related to sexual harassment of female employees by senior Astra executives other than Bildman, and even by Astra customers. The pervasive sexual harassment resulted in a settlement with the Equal Employment Opportunity Commission (EEOC). Another substantial portion of Winthrop Stimson's bill centered on the EEOC action noted above, which resulted in the entry of a consent decree against Astra. The judge properly characterized the consent decree as focusing on Astra's "own sexual harassment policies and practices, and the underlying case related to the hostile work environment created by several individuals connected with Astra, not Bildman alone." Another portion of the Winthrop Stimson bill was for the settlement of individual actions brought by current or former Astra employees. After the jury's verdict, a Winthrop Stimson attorney testified, the law firm did not allocate its time for different services billed on the same date.

causation. *See, e.g., L.N.C. Invs., Inc. v. First Fid. Bank,* 173 F.3d 454, 465 (2d Cir.1999), *S.C.,* 308 F.3d 169 (2d Cir.2002), cert. denied, 538 U.S. 1033, 123 S.Ct. 2080, 155 L.Ed.2d 1063 (2003) (rejecting further use of "substantial factor" analysis, in favor of causation analysis, where "damages are sought for breach of fiduciary duty under New York law"). Indeed, the authority cited by Astra to establish in effect its automatic entitlement to the totality of the investigation costs demonstrates the opposite.[36] In the absence of sufficient evidence on causation regarding the full cost of the investigation, we discern no error

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[36] *See Aramony v. United Way Replacement Benefit Plan, supra* (rejecting argument for recovery of "one hundred percent" of investigation costs because employee's "misconduct was a substantial factor as to some portion of them" and affirming proportionate damage award of costs of investigating defendant's misconduct to extent United Way had "establish [ed] separately the requisite causation as to these distinct services and costs"); *Rubin Quinn Moss Heaney & Patterson, P.C. v. Kennel,* 832 F.Supp. 922, 936 (E.D.Pa.1993) (employer entitled to damages award of costs of investigation where court specifically found that employer's costs were incurred "[a]s a result of" defendant's breach of fiduciary duty, which "caused" investigatory costs); *Enstar Group, Inc. v. Grassgreen,* 812 F.Supp. 1562, 1564, 1568 (M.D.Ala.1993) (trial evidence "established" that employer incurred investigatory costs because employee "conceal[ed]" facts pertaining to "specific subjects" of investigation and "misrepresent[ed]" his activities). *See also American Fed. Group, Ltd. v. Rothenberg,* 136 F.3d 897, 907-908 n. 7 (2d Cir.1998) (less stringent "substantial factor" standard inappropriate where "the remedy sought is damages to compensate for a claimant's loss" because in that context "the usual damages-causation rule for tort and contract breach cases is appropriate").

in the judge's characterization of the request as "excessive." Even if Bildman's misconduct was a substantial factor in causing Astra to pay for a wide variety of services, that does not entitle it to recover for services that the judge found to be unrelated to Bildman's misconduct, simply because the same providers rendered the services and they bore some tangential relationship to Bildman's behavior. We affirm the denial of Astra's claim for the totality of its sexual harassment investigative costs.

6. *Bildman's legal fees.* The judge denied Bildman's motion for judgment on his counterclaim for legal fees and costs under the employment agreement, and entered judgment for Astra on the counterclaim. Bildman argues, in essence, that the employment agreement, read as a whole, compels a different result and obligates Astra to pay the legal fees and costs of his defense and counterclaims. Alternatively, he claims that, at a minimum, the employment agreement requires Astra to pay the legal fees and costs he incurred in successfully pressing his claim for compensation under the 1996 supplemental stock grant. The Superior Court judge's ruling on the issue of legal fees and costs is sound, and we will not disturb it.

As noted earlier, the employment agreement is expressly governed by Massachusetts law, and our review is plenary. *See Bank v. Thermo Elemental Inc.*, 451 Mass. 638, 648, 888 N.E.2d 897 (2008). We construe the employment agreement, whenever possible, as a workable and harmonious whole, in which

each provision has meaning and furthers the parties' intent. *See J.A. Sullivan Corp. v. Commonwealth,* 397 Mass. 789, 795, 494 N.E.2d 374 (1986), quoting *Charles I. Hosmer, Inc. v. Commonwealth,* 302 Mass. 495, 501, 19 N.E.2d 800 (1939) (contract must be construed so as to yield "a workable and harmonious means for carrying out and effectuating the intent of the parties"). Our starting point is the language of the employment agreement itself. Here, we are particularly concerned with par. 9 and par. 4(f), both individually and in concert.

Paragraph 9 of the employment agreement provides, in relevant part, that Astra shall pay to Bildman "all reasonable legal fees and expenses incurred by him in contesting or disputing *any* termination of this Agreement or in seeking to obtain or enforce any right or benefit provided by this Agreement" (emphasis added). Termination is defined by par. 4(f) to encompass termination by Astra for cause.[37] "Cause" is therein defined as (i) "the willful commission . . . of theft, embezzlement, fraud or other serious and substantial crimes" against Astra; (ii) "other acts or omissions materially evidencing bad

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[37] The other circumstances of termination under par. 4 of the employment agreement are death, disability, termination by Bildman without cause, termination by Astra without cause, termination by Bildman for cause, and termination on change of control of Astra. Paragraph 1 of the employment agreement declares that it shall "remain in full force and effect until terminated in accordance with and subject to the provisions of Paragraph 4."

faith toward" Astra; (iii) "conviction of . . . any criminal offense involving dishonesty or breach of trust or any felony"; or (iv) "the willful and egregious refusal or failure of [Bildman] to perform his duties at a level of performance reasonably satisfactory to the Board of Directors" continuing for more than sixty days after written notice by the board of such failure. Paragraph 4(f) further provides that if Bildman's employment is terminated for cause, so defined, Astra "shall have *no further obligation* to [Bildman] hereunder, except any obligation under any compensation or benefit plan in which [Bildman] is then a participant" (emphasis added).

Bildman's interpretation of the employment agreement places foremost emphasis on the word "any" in par. 9. He argues that the parties must have intended to include payment of his legal fees and costs for "any" termination action, including termination for cause, because the only scenario under which Bildman and Astra would likely litigate against each other would be his termination for cause. Fairly read, he argues, the limiting language of par. 4(f) applies only to Astra's obligations to pay termination benefits to Bildman beyond those he had earned. We are unpersuaded.

Paragraph 4 (f), which limits Astra's "obligation[s]" to Bildman where he has been discharged for cause, is unambiguous, as Bildman concedes. The payment of Bildman's legal fees and costs is a contractual obligation, and the employment agreement does not specify otherwise. The language of par. 4(f),

limiting Astra's obligation to Bildman where he has defrauded or otherwise wronged the company, is conspicuously absent from the other provisions addressing termination of Bildman's employment with Astra. We may reasonably assume, as did the judge, that the parties did not intend to establish as a benefit of Bildman's employment his entitlement to defraud Astra at its own expense. Moreover, in construing the employment agreement to deny Bildman his legal fees and costs, the judge relied on a cardinal principle of contract interpretation under which a more specific contract provision controls a more general provision on the same issue. *See Lembo v. Waters,* 1 Mass.App.Ct. 227, 233, 294 N.E.2d 566 (1973), quoting A. Corbin, Contracts § 547, at 176 ("If the apparent inconsistency is between a clause that is general and broadly inclusive in character and one that is more limited and specific in its coverage, the latter should generally be held to operate as a modification and pro tanto nullification of the former").

We are also unmoved by Bildman's argument that the judge destroyed the benefit of his bargain by erroneously reading a good faith requirement into par. 9, thus making it duplicative of the indemnification provisions of par. 8, which are predicated on good-faith actions.[38] We agree that par. 9, read in

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[38] Paragraph 8 provides: Astra "agrees to indemnify [Bildman] in his capacity as an officer and member of the Board of Directors of the Company, all to the maximum extent permitted under the laws of the Commonwealth of Massachusetts, from

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conjunction with the termination provisions of par. 4, gives Bildman a broader entitlement to payment of his legal fees and costs than does par. 8, but there is no evidence to suggest that that greater coverage extends to acts undertaken in bad faith against Astra itself. Rather, the wording of the employment agreement makes clear that, in certain adversary actions between Bildman and Astra that are not covered by the indemnification provisions of par. 8, Astra would be required to pay Bildman's costs of litigation. These adversary actions would include, for example, an action under par. 4(g) disputing whether a change of corporate control triggering Bildman's termination had occurred, or a dispute arising under par. 4(a) concerning a continuation of benefits to Bildman's spouse and children on his death. There is no merit to Bildman's claim that the judge's construction of par. 9 renders it hollow.[39]

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and against any and all claims, damages, suits, costs, or liabilities, arising out of or relating to the performance of his duties and responsibilities as President and Chief Executive officer. The provisions of this Paragraph 8 shall survive expiration or termination of the Agreement for any reason."

[39] The judge held that, even if the award of litigation costs under par. 9 could be construed as unaffected by the limiting provision of par. 4(f), Bildman's adjudicated acts of bad faith against Astra operated as a material breach of the employment agreement that as a matter of law excused any further obligation of performance by Astra. *See Quintin Vespa Co. v. Construction Serv. Co.*, 343 Mass. 547, 554, 179 N.E.2d 895 (1962) (material breach of contract by one party excuses other party from further performance as matter of law). In light of our

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The judge held that the indemnification provision of par. 8 was unavailable to Bildman because the jury found that he acted in bad faith, a point that Bildman does not, nor could, contest. *See* G.L. c. 156B, § 67 (providing, in part, that corporate officers and directors may not be indemnified with respect to any matter in which they have been adjudicated not to have acted in good faith toward corporation).

Nor do we find merit in Bildman's secondary argument that he is entitled to reimbursement from Astra for legal fees and costs related to his "successful" action on the 1996 stock options.[40] *See* note 20, *supra*. As we have seen, par. 4(f) of the employment agreement provides that the company shall have "no further obligation" to Bildman if he is terminated for cause except "any obligation under a compensation or benefit plan" in which Bildman participated. Astra issued a "long term management stock plan letter agreement" (letter agreement) in March, 1996, granting Bildman certain shares of stock pursuant to the company's 1993 long-term

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holding above, we need not address this rationale, other than to note that we find nothing in the language of the employment agreement to support Bildman's claim that it operated to limit Astra's common-law rights under the laws of the Commonwealth. Cf. *Sahli v. Bull HN Info. Sys., Inc.*, 437 Mass. 696, 697 n. 3, 774 N.E.2d 1085 (2002) (release of common-law claims).

[40] The judge's ruling denying Bildman's contractual claim for legal costs and fees does not separately address the stock option controversy, although Bildman did press that separate argument below.

management stock plan (stock plan). Bildman acknowledged in writing receiving both documents. Neither the letter agreement nor the stock plan provides for the payment of Bildman's legal fees and costs in a contested action with the company. Thus, neither the employment agreement nor the stock option agreements entitle Bildman to attorney's fees for his dispute with Astra concerning the 1996 supplemental stock grant.

7. *Negligent libel.* Before trial, the judge allowed Astra's motion for summary judgment on Bildman's claims for negligent libel, malicious libel, and libel per se based on various statements published by Astra, Johansson, and Mogren from April 29, 1996, through June 26, 1996.[41] Bildman ascribes error only to the judge's ruling that he was a "limited purpose public figure" and thus unable to sustain a libel claim absent clear and convincing proof of "actual malice," that is, that the statement was made with knowledge of its falsehood or with reckless disregard for whether it was false.[42] *See New York*

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[41] We reject Astra's claim that Bildman waived the argument that he was a private person and not a limited purpose public figure because Bildman never asserted on summary judgment that he was a private individual. We agree with Bildman that his argument that he was a private figure was central to his counterclaim for negligent libel.

[42] On summary judgment the judge reviewed several allegedly defamatory statements disseminated to Astra employees, in press releases, via news conferences, and by other means. The judge determined as to most of these statements that they were either true or nondefamatory as a matter of law. As to statements

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Times v. Sullivan, 376 U.S. 254, 279-280, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964) (actual malice standard). *See also Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 351, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974) (describing limited purpose public figure); *Jones v. Taibbi*, 400 Mass. 786, 797-798, 512 N.E.2d 260 (1987) (same). Bildman claims, in essence, that he was a private figure thrust unwittingly into the public spotlight over a "private dispute" in which statements were negligently made that ruined his reputation. *See id.* at 797, 512 N.E.2d 260 (for private persons liability may be imposed "upon proof of negligent publication of a defamatory falsehood"). The judge did not err.

On appeal, Bildman's negligent libel claim focuses on the following statements: (a) a May 3, 1996, article in the Wall Street Journal in which an Astra spokesperson described Bildman as "not forthcoming" to Astra AB about the Business Week investigation; (b) a speech Mogren gave to Astra employees on May

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that might lend themselves to negligent libel claims, the judge ruled that Astra was entitled to summary judgment because Bildman, as a limited purpose public figure, would be unable to meet his burden at trial of proving the statements to have been made with actual malice. Bildman does not appeal from the judge's rulings as to malicious libel or libel per se, nor does he argue, as he did below, that summary judgment was improper by reasons of "defamation by conduct," *see, e.g., Alaska Statebank v. Fairco*, 674 P.2d 288, 294 (Alaska 1983) (plaintiff's conduct "was clearly defamatory despite the fact that the statement communicated by the repossession [of property] was not actually verbalized"), a theory that, as the judge noted, we have not recognized.

13, 1996, in which he stated, among other things: "[S]ome people have tried to put themselves above the rules, at the same time that they have made great efforts to cover up what has happened"; (c) a June 26, 1996, Astra news release and press release that made identical statements that, as Bildman summarizes on appeal, he "had engaged in inappropriate behavior at company functions, that he had disregarded company rules and procedures, that he had failed to keep the company apprised, that he had rented outside office space for the purpose of keeping information from the parent company, that he had used company funds for family vacations and that he had used approximately $2 million for personal expenses"; and (d) an Astra statement appearing in the February 5, 1998, Boston Globe that Bildman's "actions-asking people to destroy records and the like-are in our estimation an attempt to cover up and keep things from his superiors in the company."

Where facts are undisputed, the status of a libel plaintiff is a question of law for the judge. *Bowman v. Heller,* 420 Mass. 517, 522, 651 N.E.2d 369, cert. denied, 516 U.S. 1032, 116 S.Ct. 682, 133 L.Ed.2d 530 (1995). Here, the judge applied the two-part test of *Gertz v. Robert Welch, Inc., supra,* to determine whether Bildman was a limited purpose public figure. *See Bowman v. Heller, supra* at 524 n. 7, 651 N.E.2d 369 ("public controversy" must exist, and "the nature and extent of the individual's participation in the particular controversy" must be determined). The judge first considered whether the allegedly defamatory

statements involved a matter of public controversy. *See id.* The judge had little difficulty, as do we, concluding that the issue of widespread sexual harassment at a publicly traded company employing 1,000 people is a matter of general concern. Although Bildman argues that the serious allegations against him "were unlikely to be felt by persons not involved in the controversy," the issue of sexual harassment in the workplace is a focus of a considerable body of State and Federal law and regulation and a matter of frequent and often heated public debate.[43] The topic of Bildman's actions echoed far beyond Astra, its employees, and their families. For many months, it wove its way into the national and international discourse about permissible conduct in the workplace and the place and treatment of women in the private sector. *See, e.g.*, Sexual-Harassment Cases Trip Up Foreign Companies: Astra and Mitsubishi Handle Complaints Differently, But Both Hit Pitfalls, Wall St. J., May 9, 1996, at B4.

Second, the judge considered the nature and extent of Bildman's participation in the controversy. *See Bowman v. Heller, supra* at 523 n. 7, 651 N.E.2d 369. Here she found, on the undisputed record, that

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[43] Although the judge did not identify the dispute between Astra and Bildman as evidencing matters of public concern other than sexual harassment, the parties' dispute might be said to reflect other issues of general interest, such as corporate integrity, corporate governance, and corporate financial controls, among others, all of which have attracted much recent media attention.

Bildman was neither a victim nor an unwitting participant in the broad media coverage of his dispute with Astra.[44]

In each instance, Bildman or his counsel denounced Astra in unequivocal terms. "Since the beginning of this case, I and my family have been outraged at the irresponsible allegations that have been made against me," Bildman is quoted as saying in a press release issued by his counsel on June 4, 1996. In a press release of June 26, 1996, Bildman's counsel denounces "the company's allegations of financial wrongdoing by Lars Bildman," "scurrilous and untrue allegations brought by disgruntled former employees," and a "'star chamber' investigation" by Astra of Bildman.[45] These remarks are fairly typical

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[44] The judge found that Bildman, through counsel, repeatedly contacted and used the media, including Business Week, the Boston Globe, and the Boston Herald, to comment on the investigation, deny and rebut Astra's allegations, and influence the resolution of the investigation in the public eye. In addition, Bildman sent press releases to various media outlets, including the New York Times, Wall Street Journal, Reuters, United Press, New England Cable News, CBS News, WCVB-TV, WLVI-TV, and WHDH-TV in Boston. Bildman also entered into unsuccessful negotiations with CBS News to be interviewed on its evening news program in New York and appeared in an interview on a Swedish television program.

[45] To the extent that Bildman claims that he acted as a private person because he struck back at Astra only after the company had begun to defame him, it does not pass notice that Bildman began assembling a public relations team in mid-December to influence information disseminated by and to both Business Week and Astra AB, months before Astra AB learned

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of Bildman's thrust and parry. His is not a case in which the libel plaintiff is a "bit player" in a media drama created by forces over which he had no control. Bildman played a central role, with "access to the channels of effective communication" that most private individuals do not enjoy. *See Gertz v. Robert Welch, Inc., supra* at 344, 94 S.Ct. 2997 (noting that private individuals generally do not have same access to media as public figures). It is "readily apparent" to us, as it was to the judge, that Bildman "palpably engineered efforts to project himself into the public limelight." *Tripoli v. Boston Herald-Traveler Corp.*, 359 Mass. 150, 156, 268 N.E.2d 350 (1971).

Because the judge correctly concluded that Bildman was a limited purpose public figure in relation to the allegedly defamatory statements, she correctly awarded summary judgment to Astra on his negligent libel claims.

8. *Conclusion.* For the foregoing reasons, we affirm the judgments against Astra on the issues of rescission and costs of investigation, and against Bildman on the issues of attorney's fees and libel. We reverse the judgment denying Astra recovery of compensation it paid to Bildman during the period of his disloyalty – $5,599,097 in salary and $1,180,000 in

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of, much less spoke publicly about, his wrongdoing at the company. We add that the media storm that swept over Bildman originated in his own wrongful conduct as a corporate officer and director beginning years before Business Week began its investigation.

bonuses. We affirm the jury's verdict awarding Bildman $203,691 in damages related to the supplemental stock grant, because on appeal Astra has waived any claim of forfeiture of that award.

We remand the case to the Superior Court for entry of judgments consistent with this opinion.

So ordered.

2006 WL 760283 (Mass.Super.)

Superior Court of Massachusetts,
Suffolk County.
ASTRA USA, INC.
v.
Lars BILDMAN.[1]

Lars Bildman
v.
Hakan Mogren et al.[2]

Nos. 980580C, 991942G.

Jan. 26, 2006.

FINDINGS OF FACT, RULINGS OF LAW AND ORDER ON THE EQUITABLE FORFEITURE CLAIM OF ASTRA USA, INC. AGAINST LARS BILDMAN

MARGARET R. HINKLE, Justice.

On February 21, 2002, after a seven-week trial, a jury found that Lars Bildman ("Bildman") defrauded Astra USA, Inc. ("Astra" or "Astra USA") and converted Astra funds. For this conduct, the jury awarded Astra $875,512 in damages. The jury also found that Bildman wasted the assets of Astra, causing Astra $1,040,812 in damages. Further, the jury found that Bildman breached his fiduciary duty to Astra by making affirmative misrepresentations while he was its President and CEO, failing to

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[1] Carl-Gustaf Johansson.

[2] Carl-Gustaf Johansson.

disclose material information he had a duty to disclose, and improperly using Astra funds. The jury found that this conduct was a substantial factor in causing harm to Astra, and, as a result, Astra was entitled to $1,040,812 in damages. The jury found that its damages awards overlapped, and that, without overlapping, Astra was entitled to a total of $1,040,812 in damages from Bildman. The jury also found that Bildman engaged in sexual harassment, violated Astra's sexual harassment policy, and retaliated against one or more Astra employees who exercised their right to make a complaint under Astra's sexual harassment policy.[3] The jury made other findings not relevant to the equitable forfeiture matter pending before the Court.

At trial I reserved on Astra's equitable forfeiture claim. Now, following a bench trial on that claim,[4] I make the following findings of fact and rulings of law.

Findings of Fact

1. At all relevant times, Astra AB was a Swedish pharmaceutical company, publicly traded on the New York Stock Exchange. By the 1990s, Astra AB had become the fastest growing drug company in

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[3] These findings were not made in the context of Astra's fiduciary duty claim.

[4] With the parties' consent, direct examination of all live trial witnesses except Neal Tully, Esq. was presented by affidavit.

the world. Astra AB had subsidiary companies throughout the world, including research companies, which developed new drug products, and marketing companies, which marketed and sold Astra products. The subsidiaries and Astra AB constituted what was often referred to as the "Astra Group."

2. Astra AB also had independent licensees around the world, to which Astra AB licensed the rights to sell its products in certain markets. The licensees were typically competitor drug companies with which Astra AB teamed to sell its products. Under licensing arrangements, Astra AB shared with the licensee the revenue received upon the sale of the product.

3. The world pharmaceutical market consists of generic multi-source and patented single-source products. Sales of single-source patented products typically have higher gross margins than sales of generic multi-source products.

4. Astra AB is a research-intensive company with a product portfolio dominated by high-margin patented drugs.

5. At all relevant times, the United States was the biggest pharmaceutical market in the world. The prescription drug market in the United States has two primary sectors: the hospital sector and the outpatient or office-based physician sector, also referred to as the general practitioner market ("the GP market"). At relevant times, the hospital sector represented about 10 percent of the total American

prescription drug market, with the remaining 90 percent in the GP market.

6. In the American market, Astra AB previously out-licensed all its major patented drugs aimed at the GP market. In particular, in the early 1980s, Astra entered into a license agreement with Merck which gave Merck the exclusive first right to all Astra AB original research products in the GP market in the United States. This agreement was known as the Astra-Merck joint venture.

7. Throughout the 1980s and 1990s, Astra USA was unable to sell any Astra AB patented drugs in the United States unless the licensee chose not to exercise its right to sell a particular drug. Thus, Astra USA was limited to multi-source generic products, with low margins, in the hospital sector.

8. Lars Bildman served as President and Chief Executive Officer of Astra USA, Inc. ("Astra") from 1991 though his termination in 1996. Bildman began his employment at Astra AB in 1972. In 1976, he became Vice President of Administration and Finance for Astra Germany, where he was promoted to Executive Vice President in 1979.

9. In 1980, Bildman was asked by the then-President and CEO of Astra AB to become President and CEO of Astra Pharmaceuticals, the American subsidiary of Astra AB, which later became Astra USA, Inc. At this time, the U.S. subsidiary was the only Astra AB subsidiary operating at a loss.

10. After Bildman became President and CEO of Astra, he made significant management changes: he brought in a new management team, implemented a new business strategy, and laid off almost half the work force.

11. Around 1988, Hakan Mogren ("Mogren") was appointed President and CEO of Astra AB. Among other things, Mogren reorganized Astra AB's subsidiaries into geographical regions with Astra USA becoming a part of the "Americas" region.

12. Around this time, Astra AB's goal became expansion of its presence in the United States GP market through its own sales organization rather than through license agreements. Mogren established a special task force, which included Bildman, to investigate different ways to achieve independence from licensees in the United States market.

13. The task force investigated different strategies for achieving a wholly-owned presence in the GP market and determined among other things, that a marketing and sales organization and resources for medical and clinical research were critical to expansion.

14. To that end, Mogren directed task force members to initiate talks with Merck to learn whether Merck had any interest in dissolving its joint venture with Astra, and, if so, at what price.

15. The task force investigated alternatives for expansion into the GP market, including: (1) out-licensing of future original Astra AB research

products through licensees; (2) acquisition of a company already present in the GP market with a large sales force; or (3) internal organic growth of a new sales force and marketing organization with research capabilities.

16. Mogren rejected the out-licensing alternative because it would not provide Astra a complete pay-back on its research investments.

17. For fiscal reasons, Mogren also rejected the acquisition alternative.

18. Mogren formally adopted a new strategic mission for Astra AB in the United States to develop a new outpatient division to penetrate the GP market. The directors of both Astra AB and Astra USA approved this strategy.

19. As a result of this strategy, unlike all other Astra subsidiaries, Astra USA's strategic mission for the period 1991 to 1996 was less to contribute financially to its parent and more to create a new organization prepared to launch Astra AB high-margin research products in the local GP market.

20. To implement Astra AB's new United States strategy, Astra USA organized its operation into two divisions: the Hospital Division, which conducted business in the traditional hospital market, and a new Rx Division, to conduct business in the larger, more profitable GP market.

21. Astra AB recognized that the expansion of the Rx Division in the U.S. would negatively impact

the consolidated total financial contribution reported by Astra. The Astra Group used the term "total contribution" in its financial reporting as a measure of subsidiary profitability. Total contribution is essentially the equivalent of gross profit.

22. Astra AB decided to finance development of the Rx Division largely through revenues generated by the Hospital Division. In 1991, Astra USA launched development of the Rx Division, using capital from the Hospital Division.

23. Building the Rx Division required hiring and training an entire new sales force to conduct office-based sales. The plan was to build a sales force of about 500 individuals in the Rx Division by 1995. To that end, Astra USA recruited and built a national sales force and implemented new sales and marketing strategies.

24. Around this time, Astra USA decided to launch the sale of two generic drugs, Toprol-XL and Rhinocort Aqua, in the GP market to prepare the sales force for the major anticipated launch of Pulmicort Turbuhaler ("Pulmicort"). Pulmicort was a highly-successful patented research drug of Astra AB, which its subsidiaries in other world markets had been successfully selling throughout the early 1990s.

25. Since Merck had decided not to sell Pulmicort in the United States, it was available to Astra USA to sell in the United States market, but Astra USA lacked a sales force to sell the product.

26. Although the Hospital Division continued to generate significant revenue, the consolidated total contribution of Astra USA to Astra AB was near zero from the start-up of the Rx Division. Astra AB's objective was to have the Rx Division begin to generate a positive cash flow through Pulmicort Turbuhaler.

27. In its 1991-96 Annual Reports, Astra AB advertised creation of the new Astra USA Rx Division and anticipated a major launch of Pulmicort Turbuhaler within that division.

28. Each year, Astra AB subsidiaries generated a Marketing Company Plan in which each subsidiary outlined its business strategy for the next three years, with the first year as a budget, and reported financial and sales performance for the prior year.

29. From 1991 to 1996, each budget and Marketing Company Plan for Astra USA included projections for the Rx Division and implemented the new strategy for Astra USA in the local market.

30. Every budget and plan for each division and the consolidated plan for Astra USA reflected this agreed-upon financing arrangement for the Rx division. The Astra AB and the Astra USA directors reviewed and approved all Marketing Company Plans and budgets, which included projected losses for the Rx Division for its first years until the launch of Pulmicort Turbuhaler, and a lowered consolidated total contribution by Astra USA.

31. Astra USA's overhead costs increased with the development of the Rx Division, which impacted Astra USA's profit and consolidated total contribution.

32. Astra USA's contribution to Astra AB, which was 2% of Astra AB's net profit in 1991, declined to only .6% by the end of 1995. Even though Astra USA's sales increased during this period, its growth lagged behind that of the Astra Group as a whole from 1991 to 1995. Astra USA's net profit was essentially the same at the end of 1995 (105 million Swedish Kroner) as it had been at the end of 1991 (102.9 million Swedish Kroner). This contrasted with the growth in profitability of other Astra AB subsidiaries.

33. In the 1990s, Astra AB launched a patented drug called Losec. By the mid-1990s, Losec was the most profitable drug sold by Astra AB and, at one point, the world's largest selling drug. During 1991 to 1996, Merck had exclusive rights to sell Losec in the United States under its joint venture agreement with Astra. In its Annual Reports, Astra AB reported that the profitability of its subsidiaries was a direct result of the sale of Losec. Stated variously, the subsidiaries which out-performed Astra USA in total contribution during 1991 to 1996 had access to Losec, and Astra USA's inability to sell Losec hampered its total contribution.

34. Under Bildman's tutelage, Astra USA became profitable in three years and reestablished its position in the local anesthetics market. At the time,

the local anesthetic world market was dominated by three Astra AB products: Xylocaine, Marcaine, and Carbocaine. Of these products, Astra USA had the right to sell only Xylocaine. Unlike all other Astra AB subsidiaries, Astra USA had no access to Marcaine and Carbocaine because Astra AB had out-licensed Marcaine and Carbocaine in the United States to Astra USA's major competitor.

35. Astra USA's market shares for all its major hospital products grew during 1991-96. Despite being restricted to selling mainly generic local anesthetics, Astra USA continued to grow in market share.

36. However, Astra USA's share in the so-called local anesthetics market was lower than the share of the local anesthetics market of Astra AB as a whole and less than that of numerous Astra AB subsidiaries. Put another way, Astra AB's share of the local anesthetics market in the world, and the share of numerous Astra AB subsidiaries in their respective local anesthetic market, was considerably greater than Astra USA's share of the American local anesthetics market.

37. In the new Rx Division, Astra USA successfully launched two products in the GP market during 1991 to 1996 for training purposes. In 1992, Astra USA launched ToprolXL and in 1994, Astra USA launched Rhinocort Aqua. Toprol-XL and Rhinocort were generic versions of products previously in the United States market.

38. By 1995, both Rhinocort and Toprol-XL showed growth in their respective market segments and increased revenues significantly. At the same time, the Hospital Division continued to be profitable for Astra USA with increased market share and profits.

39. As conceded by Bildman, the Rx Division lost money each year.

40. During 1991 to 1996, Astra USA met or exceeded its financial commitments to the Astra Group outlined in the Marketing Company Plans and budgets.

41. In its Annual Reports during 1991 to 1996, Astra AB praised the growth and performance of Astra USA.

42. In the 1991 Annual Report, Astra AB reported that the trend for the Hospital Division of Astra USA was "highly favorable" with a 30% increase in sales.

43. In the 1992 Annual Report, Astra AB reported that Astra USA's sales rose 19%, with sales in the local anesthetic group adversely affected by changes in product range.

44. In the 1993 Annual Report, Astra AB reported that sales at Astra USA rose 20%, attributed in part to the early success in the sales of Toprol-XL.

45. In the 1994 Annual Report, Astra AB reported that sales at Astra USA rose 13%, and

noted the successful launch of both Toprol-XL and Rhinocort in the Rx Division.

46. In the 1995 Annual Report, Astra AB reported that Astra USA had been strengthened by the addition of the Rx Division and successful launches of Toprol-XL and Rhinocort. Astra AB reported "rapid development" for Astra USA in 1995, with Toprol and Rhinocort leading growth in their respective market segments.

47. In the 1996 Annual Report, Astra AB again reported rapid growth of Astra USA with the successful launches of Toprol-XL and Rhinocort. The report also anticipated the launch of Pulmicort through the Rx Division.

48. Neal Tully, Secretary to the Astra USA Board of Directors from 1991-1996, testified that Mogren and other Astra AB executives consistently praised Bildman for the success of Astra USA. I credit that testimony and conclude that Bildman's tenure at Astra USA was highly successful with the exception of the serious matters that gave rise to his termination and this litigation.

49. Louis Lasagna, Chairman of the Astra USA Board of Directors during the relevant time period, often praised Bildman for his leadership of Astra USA. For example, at the directors' meeting held on December 6, 1995, at which Mogren was present, Lasagna stated that Bildman and his management team had completed "a tremendous year."

50. By 1995, Astra USA had successfully built the Rx Division and was ready to market and sell Pulmicort Turbuhaler once that drug was approved by the FDA.

51. Astra USA had budgeted and planned to launch Pulmicort Turbuhaler as Astra AB's first major drug marketed by a wholly-owned Astra subsidiary on the American market without a local marketing and sales partner.

52. However, in early 1995, the FDA denied Astra's application for Pulmicort largely because, in the application, Astra AB submitted test results from a different product to support the application. As a result, Pulmicort was not brought to market during Bildman's tenure.

53. At the time of Bildman's suspension in 1996, the net profits of Astra AB subsidiaries operating in smaller markets than Astra USA exceeded those of Astra USA. For example, Astra Belgium's net profits were three times greater than those of Astra USA; Astra Netherlands and Astra Australia generated net profits eight times greater, and Astra Germany's net profits were 22 times greater. Astra USA's relative performance was largely attributable to the other subsidiaries' ability to sell Losec, which, as noted, Astra USA could not sell, and to the fact that other subsidiaries were able to bring the Pulmicourt Turbuhaler to market.

54. Around 1985, Astra AB instituted a worldwide profit sharing plan. Each subsidiary was

provided grants based upon the number of employees. The funds allocated to each subsidiary were based upon the financial performance of Astra AB and not that of the subsidiary. Each subsidiary CEO had authority to use the funds in a manner best fitting his company's overall goals, recognizing local conditions.

55. In contrast to all other participating subsidiaries, Astra USA under Bildman permitted all employees at Astra USA to share equally in its profit sharing plan. Thus, Bildman received a smaller grant than any other CEO of the Astra Group. Each employee of Astra USA received yearly payments as a participant in the profit sharing plan. This plan was not dependent upon the performance of individual employees or individual subsidiaries.

56. Beginning in 1981, Astra USA, with the approval of Astra AB, implemented an annual bonus for the entire management team of Astra USA, including Bildman. This bonus program was in effect through 1996. The Astra USA bonus program was based on the performance of Astra USA, and not on individual performance.

57. After discussions and agreement with Bildman, Astra AB set the yearly performance goals for Astra USA and the corresponding size of the bonus pool. Astra AB also established Bildman's share in the bonus pool.

58. Bildman received a bonus for each year that Astra USA exceeded its bonus targets. During the

period 1982 to 1996, only in 1987 did Astra USA fail to achieve the yearly target of Astra AB.

59. Around 1991, Astra USA began exploring implementation of a long-term stock grant program to attract management-level employees.

60. Astra USA and Astra AB retained executive consultants to analyze Bildman's compensation in conjunction with the stock plan review.

61. Attorney Tully, Astra USA's board secretary, reported to Astra AB that although Bildman's short-term compensation (salary and bonus) was within 10% of industry standards, Bildman's overall compensation was not competitive with similar executives and was 50% less than industry standards due to the lack of a long-term plan.

62. In or around 1993, Astra AB implemented a long-term compensation program at Astra USA using grants of Astra AB stock. Under this program. Astra AB granted Bildman shares of Astra AB stock according to a vesting schedule. Due to his termination Bildman did not receive his entire long-term compensation. He forfeited 3,275 shares of Astra AB stock granted in 1996, 4,767 shares granted in 1995, 5,439 shares granted in 1994, and 3,770 shares granted in 1993.

63. In addition to serving as CEO and President of Astra USA, Bildman also served as a director of Astra USA and Astra Germany.

64. In 1991, Astra paid Bildman a total of $928,751.60, including a bonus of $300,000. In 1992, it paid him $893,098.18, including a bonus of $300,000. In 1993, it paid him $955,348.56, including a bonus of $200,000. In 1994, it paid him $848,824.61, including a bonus of $180,000. In 1995, it paid him $1,028,583.75, including a bonus of $200,000. In 1996, it paid him $944,490.50, and awarded him a supplemental stock grant valued at $203,691 in March of that year.

Rulings of Law

Because of the jury findings in favor of Astra on its breach of fiduciary duty claim, Astra now seeks equitable relief in the form of forfeiture of Bildman's compensation for the years 1991 through 1996. This Court previously ruled that Massachusetts' three-year limitations period for breach of fiduciary duty claims applies to Astra's forfeiture claim. However, because Bildman failed to plead a statute of limitations defense in his answer or amended answer, I find and rule that he has waived this defense. See Mass.R.Civ.P. 8(c).

Because Astra is a New York corporation, New York law governs its claim for forfeiture. See *Harrison v. NetCentric Corp.*, 433 Mass. 465, 470-71, 744 N.E.2d 622 (2001) (law of state of incorporation governs matters relating to internal affairs of corporation, including breach of fiduciary duty). Under New York law, an individual who owes a duty

of fidelity to a principal and is faithless in the performance of his services is generally disentitled to recover his compensation, whether or not his services benefitted the principal and even if the principal suffered no damages by reason of his breach of duty. *Royal Carbo Corp. v. Flameguard, Inc.,* 229 A.D.2d 430, 645 N.Y.S.2d 18, 19 (N.Y.A.D. 2 Dept.1996); *Feiger v. Iral Jewelry, Ltd.,* 41 N.Y.2d 928, 394 N.Y.S.2d 626, 626, 363 N.E.2d 350 (N.Y.1977); *Lamdin v. Surface Advertising Corp.,* 272 N.Y. 133, 138, 5 N.E.2d 66 (N.Y.1936).

In a May 4, 2005 Memorandum of Decision, this Court recognized that Astra may be entitled to forfeiture of Bildman's salary and bonuses during his period of disloyalty, depending on my findings and rulings in this decision. A fiduciary is generally required to repay only the portion of his compensation in excess of the worth of his services. See *Meehan v. Shaughnessy,* 404 Mass. 419, 440, 535 N.E.2d 1255 (1989); *Chelsea Industries, Inc. v. Gaffney,* 389 Mass. 1, 14, 449 N.E.2d 320 (1983). "This limitation stems from the premise that the forfeiture remedy is not a penalty but really reimbursement of payment for services not properly performed . . . Therefore, compensation is often apportioned in relation to the services indeed properly performed." *In re Tri-Star Technologies Co., Inc.,* 257 B.R. 629, 636 (Bankr.D.Mass.2001). See *Anderson Corp. v. Blanch,* 340 Mass. 43, 51, 162 N.E.2d 825 (1959); *Lydia E. Pinkham Medicine Co. v. Gove,* 303 Mass. 1, 4, 20 N.E.2d 482 (1939).

The fiduciary bears the burden of proving the fair value of his services during the time he engaged in disloyal conduct; if he fails to do so, it is appropriate to forfeit his entire compensation. See *Chelsea Industries, Inc. v. Gaffney,* 389 Mass. at 14, 449 N.E.2d 320. The extent of equitable forfeiture of compensation is left to the sound discretion of the trial court, with reference to the peculiar factors found to be present in the case, including the nature of the conduct and whether the breach was egregious, whether the breach caused actual injury to the corporation, and the extent to which the improper activities diverted the fiduciary's time and energy from his corporate responsibilities. See *Anderson Corp. v. Blanch,* 340 Mass. at 50-51, 162 N.E.2d 825; *Production Machine Co. v. Howe,* 327 Mass. 372, 378-79, 99 N.E.2d 32 (1951); *In re Tri-Star Technologies Co., Inc.,* 257 B.R. at 637 & n. 10.

Here, Bildman's breach of fiduciary duty constitutes serious misconduct. In weighing the equities, however, this court considers that some of Bildman's unsavory behavior may have been in keeping with Astra's corporate culture at the time in question, and tolerated, at least for a time, by the directors. See *Design Strategies, Inc. v. Davis,* 384 F.Sup [sic].2d 649, 661-62 (S.D.N.Y.2005) (noting that one line of cases under New York law suggests that disloyal employee need not forfeit promised compensation when misconduct does not substantially violate contract of service, and disloyalty may not be substantial

where it consists of single act or where employer knew of and tolerated the behavior).

As found by the jury, Bildman's breach of fiduciary duty caused actual injury to Astra, for which the company was compensated by the jury's award of more than a million dollars in damages. Astra argues that in measuring the magnitude of the harm Bildman caused, this court should include the $905,080.06 paid by Astra's Board of Directors to the law firm of Winthrop Stimson to investigate Bildman's misconduct after the Board learned in April of 1996, through a *Business Week* article, that some Astra employees alleged sexual harassment by Bildman and other senior managers. This Court agrees, without delving into the particulars, that the fact that Astra was forced to spend time and money investigating Bildman is harm to be considered in weighing the equities of forfeiture.[5]

However, I am unpersuaded that Bildman's conduct was a substantial factor in causing Astra harm with respect to Astra's settlement with the Equal Employment Opportunity Commission ("EEOC"). On February 5, 1998, the EEOC filed a complaint against Astra, alleging, among other things, that "Astra management officials, including but not limited to,

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[5] This Court rejects, however, any renewed attempt by Astra to recover the costs of the investigation as damages, an offset, or otherwise. This Court has addressed that issue on several prior occasions.

Lars Bildman and George Roadman, used their authority and positions in the Company to engage in . . . sexual harassment," and that Astra under Bildman maintained a "hostile work environment." On February 5, 1998, the EEOC and Astra entered into a Consent Decree, approved by a local federal judge. Under the Consent Decree, Astra paid $9.85 million into a fund to be used to pay individuals who demonstrated to a Special Master that they had claims against Astra for sexual harassment. The Special Master was appointed to review the claims, determine eligibility for payment under the terms of the Consent Decree, and make awards. The Special Master did not conduct evidentiary hearings on the claims or contact Bildman or others whose conduct formed the basis of these claims to contest the claims if they desired. Therefore, it would be unfair for this Court in this litigation to use the EEOC settlement as evidence of Bildman's harm to Astra, particularly since Astra concedes that the Consent Decree did not constitute an adjudication of the validity of the claimants' allegations against Bildman. Accordingly, I do not consider the EEOC settlement as harm caused by Bildman in weighing the equities of forfeiture.

Another relevant consideration is the extent to which the improper activities diverted the fiduciary's time and energy from his corporate responsibilities. Here, I find and rule that Bildman's breach of fiduciary duty did not substantially divert his time or energy from Astra, cause his productivity to wane, or

affect the normal operations of Astra. See *Meehan v. Shaughnessy,* 404 Mass. at 440, 535 N.E.2d 1255 (no forfeiture where attorneys who were secretly preparing to compete with their firm and unfairly took clients with them were as productive during period of breach as they had always been). Rather, I conclude that Bildman at all relevant times worked primarily to advance Astra's interests and that he successfully implemented Astra's business strategy for the period from 1991 to 1996. Cf. *Aramony v. United Way of America,* 28 F.Sup [sic].2d 147, 176 (S.D.N.Y.1998), aff'd in part, rev'd in part on other grounds, 191 F.3d 140 (2d Cir.1999) (President/CEO of United Way convicted of embezzlement had to forfeit $951,250 in salary paid while he breached fiduciary duty; although he was responsible for United Way's rise to prominence during that period, his fraudulent diversion of assets squandered millions of dollars in contributions intended to benefit neediest members of society, undermining non-profit's mission and possibly damaging public confidence).

Weighing the relevant factors, and without minimizing the serious breach of fiduciary duty committed by Bildman, this Court concludes that Bildman has met his burden of proving the fair value of his services during the period from 1991 through 1996, and that he earned his compensation in each of those years despite his breach. Cf. *Boston Children's Heart v. Nadal-Ginard,* 73 F.3d 429, 436 (1st Cir.1996) (forfeiture of compensation warranted where fiduciary did not establish value of his services

because evidence was speculative, conflicting, and relied on self-aggrandizing statements). Bildman's breach of fiduciary duty did not negate his otherwise proper performance as President and CEO of Astra USA, and the forfeiture of salary now sought by Astra would impose a penalty on Bildman which I conclude would be disproportionately harsh under all the circumstances. This Court, in its discretion, therefore rules that Astra is not entitled in equity to reimbursement of the salary paid to Bildman during the relevant period, insofar as he earned that salary by providing valuable services despite his breach of fiduciary duty.

Lastly, the bonuses paid to Bildman between 1991 and 1995 were compensation based not on his individual performance but on the performance of Astra USA. As discussed above, under Bildman's leadership Astra USA succeeded in its mission to launch the Rx Division. Given the undisputed evidence that Astra USA met its performance goals in the years at issue, I conclude that Bildman has satisfied his burden to show that he provided valuable services and earned his bonuses. Accordingly, despite Bildman's serious breach of fiduciary duty, Astra is not entitled in equity to reimbursement of the bonuses paid to Bildman between 1991 and 1995.

ORDER

Based on the foregoing findings of fact and rulings of law, it is hereby *ORDERED* that Astra

USA, Inc., is not entitled to equitable forfeiture of the salary and bonuses paid to Lars Bildman between 1991 and 1996.

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. **SUPERIOR COURT**
CIVIL ACTION
NOS. 98-0580-C
99-1942-G
[CONSOLIDATED]
(Specially Assigned to Judge Hinkle)

ASTRA USA, INC.,
Plaintiff,
v.
LARS BILDMAN,
Defendant,
v.
ASTRA AB, HAKAN MOGREN and CARL-GUSTAF JOHANSSON,
Third-Party Defendants.

LARS BILDMAN,
Plaintiff,
v.
HAKAN MOGREN and CARL-GUSTAF JOHANSSON,
Defendants.

FINAL JUDGMENT

All issues have now been tried in these consolidated cases. Specifically, the jury has rendered its verdict on special questions, and the Court has rendered pre-verdict orders dismissing and otherwise disposing of certain claims and post-verdict orders on the remaining issues. Therefore, judgment shall enter as follows:

I. Claims, Counter-Claims and Third Party Claims.

A. Plaintiff Astra USA, Inc.'s Claim Against Defendant Lars Bildman (C.A. 98-0580).

1. Count I (Fraud) – Judgment shall enter in favor of Astra USA, Inc. ("Astra").

2. Count II (Breach of Fiduciary Duty and the Duties of Good Faith and Loyalty) – Judgment shall enter in favor of Astra.

3. Count III (Waste of Corporate Assets) – Judgment shall enter in favor of Astra.

4. Count IV (Rescission) – Judgment shall enter in favor of Lars Bildman.

5. Count V (Conversion) – Judgment shall enter in favor of Astra.

6 Damages are awarded on Counts I-III and V in favor of Astra and against Lars Bildman in the amount of $1,040,812, plus interest and costs.

B. Plaintiff-in-Counterclaim Lars Bildman's Claims Against Defendant-In-Counterclaim Astra USA, Inc. (C.A. 98-8580).

7. Count I (Breach of contract) – Judgment shall enter in favor of Astra.

8. Count II (Fair Wage Practices) – Judgment shall enter in favor of Astra.

9. Count III (Indemnification for Cost and Expenses incurred in this Action) – Judgment shall enter in favor of Astra.

10. Count IV (Indemnification for Costs and Expenses incurred in Defending Criminal Action) – Judgment shall enter in favor of Astra.

11. Count V (Libel-Malice) – Judgment shall enter in favor of Astra.

12. Count VI (Libel-Negligence) – Judgment shall enter in favor of Astra.

13. Count VII (Libel-Per Se) – Judgment shall enter in favor of Astra.

C. Third-Party Plaintiff Lars Bildman's Claims Against Third-Party Defendants Hakan Mogren and Carl-Gustaf Johansson (C.A. 98-0580).

14. Count V (Libel-Malice) – Judgment shall enter in favor of Hakan Mogren and Carl-Gustaf Johansson.

15. Count VI (Libel-Negligence) – Judgment shall enter in favor of Hakan Mogren and Carl-Gustaf Johansson.

16. Count VII (Libel-Per Se) – Judgment shall enter in favor of Hakan Mogren and Carl-Gustaf Johansson.

D. Third-Party Plaintiff Lars Bildman's Claim Against Third-Party Defendant Astra AB (C.A. 98-0580).

17. Count I (Breach of Contract) – Judgment shall enter in favor of Astra AB.

18. Count II (Fair Wage Practices) – Judgment shall enter in favor of Astra AB.

19. Count III (Indemnification for Cost and Expenses incurred in this Action) – Judgment shall enter in favor of Astra AB.

20. Count IV (Indemnification for Costs and Expenses Incurred in Defending Criminal Action) - Judgment shall enter to favor of Astra AB.

21. Count V (Libel-Malice) – Judgment shall enter in favor of Astra AB.

22. Count VI (Libel-Negligence) – Judgment shall enter in favor of Astra AB.

23. Count VII (Libel-Per Se) – Judgment shall enter in favor of Astra AB.

E. Plaintiff Lars Bildman's Claims Against Hakan Mogren and Carl-Gustaf Johansson (C.A. 99-1942).

24. Count I (Intentional Interference with Contractual Relations) – Judgment shall enter in favor of Hakan Mogren and Carl-Gustaf Johansson.

25. Count II (Intentional Infliction of Emotional Distress) – Judgment shall enter in favor of Hakan Mogren and Carl-Gustaf Johansson

II. Damages and Equitable Relief

A. Supplemental Stock Grant.

26. Judgment shall enter that Lars Bildman did not fraudulently induce Astra to enter into the March 1996 supplemental stock grant and that Bildman is entitled to recover from Astra the amount of $203,691 under the March 1996 supplemental stock grant subject to Astra's right of set-off discussed below.

B. Set-Off.

27. Judgment shall enter that Astra may set-off $203,691, the amount that Lars Bildman is entitled to recover from Astra under the March 1996 supplemental stock grant, from $1,040,812, the amount Astra is entitled to recover from Lars Bildman as set forth in paragraph I.A. 6 above. After this set-off, Astra shall recover from Lars Bildman damages in the net amount, after set-off, of $837,121, with interest and costs.

C. Equitable Forfeiture.

28. Judgment shall enter in favor of Lars Bildman on Astra's claims for equitable forfeiture, punitive damages and additional compensatory damages as equitable relief.

SO ORDERED.

/s/ Margaret R. Hinkle
Margaret R. Hinkle,
Justice of the Superior Court

DATE: January 25, 2006

– Original Message –

From: SJCCommClerk@sjc.state.ma.us
[mailto:SJCCommClerk@sjc.state.ma.us)

Sent: Thursday, December 03, 2009 6:00 PM
To: Michael C. Fee
Subject: SJC-10361 –
Notice: Petition for Rehearing Denied

Supreme Judicial Court for
the Commonwealth of Massachusetts
John Adams Courthouse
One Pemberton Square, Suite 1400,
Boston, Massachusetts 02108-1724
Telephone 617-557-1020, Fax 617-557-1145

RE: No. SJC-10361

ASTRA USA, INC.

vs.

LARS P.E. BILDMAN;
CARL-GUSTAF JOHANSSON & others,
third-party defendants (and a companion case)

NOTICE OF DENIAL OF
PETITION FOR REHEARING

The Petition for Rehearing filed in the above captioned case has been considered by the Court (Cordy, Gants, JJ., recused) and is denied.

Susan Mellen, Clerk

Dated: December 3, 2009

To: Joseph D. Lipchitz, Esquire
Michael C. Fee, Esquire
Michael D. Weisman, Esquire
Suffolk Superior Court Dept.
Jonathan M. Albano, Esquire
Atty. David E. McCraw